(21,255.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 196.

THE UNITED STATES OF AMERICA TO THE USE OF MATTIE McC. HINE AND ROBERT E. HINE, PLAINTIFFS IN ERROR,

vs.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, AND DANIEL BOONE CLARKE WAGGAMAN, EXECUTORS OF DANIEL B. CLARKE, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1909.

In the Court of Appeals of the District of Columbia.

No. 1899.

THE UNITED STATES OF AMERICA to the use of MATTIE McC. HINE and ROBERT E. HINE, Appellant,

vs.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased.

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a Supreme Court of the District of Columbia.

At Law. No. 48380.

THE UNITED STATES OF AMERICA to the use of MATTIE McC. HINE and ROBERT E. HINE, Plaintiff,

vs.

THOMAS E. WAGGAMAN and ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

1 *Declaration.*

Filed March 5, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48380.

THE UNITED STATES OF AMERICA to the use of MATTIE McC. HINE and ROBERT E. HINE, Plaintiff,

vs.

THOMAS E. WAGGAMAN and DANIEL B. CLARKE.

The plaintiff, the United States of America, who sues at the instance and to the use of Mattie McC. Hine and Robert E. Hine, com-

plains of the defendants in this suit, Thomas E. Waggaman
2 and Daniel B. Clarke, of a plea that they, the said defendants, render to the said plaintiff the sum of eighteen thousand dollars lawful money of the United States which the said defendants owe to and unjustly detain from the said plaintiff;

For that, whereas, heretofore, to wit, on the seventh day of July, 1899, at the District of Columbia, there was, and for some time theretofore had been, depending in the Supreme Court of the District of Columbia a certain cause in equity, wherein the said Mattie McC. Hine was complainant and the said Robert E. Hine and other persons were defendants, which cause was numbered and designated as equity suit No. 20,225, upon the docket of the said Court, and in which said cause the said Mattie McC. Hine in and by her bill of complaint therein filed, sought and prayed to procure the sale, by a decree of the said Court, of a certain parcel of read estate situate in the District of Columbia and mentioned and identified in the said bill;

And whereas, at the time and place aforesaid, the said Supreme Court of the District of Columbia had passed a decree in the said cause, which said decree was dated on the 6th day of July, 1899, in and by which decree the said Court had, agreeably to the prayer of the said bill of the said complainant, adjudged, ordered and decreed the sale of the said parcel of real estate mentioned in the said bill of complaint and had appointed and constituted the said Thomas E. Waggaman, hereinbefore named as one of the defendants herein, to be sole trustee for the purpose of selling the said real estate, and had directed that he should return the proceeds which he should receive from the said sale into the said Court, and should, before proceeding or assuming to act as such trustee or to make the said sale, file with the clerk of the said Court a bond to the United States of America, executed by himself, the said Thomas E. Waggaman, with a surety or sureties to be approved by the said Court or one of the justices thereof, in the penalty of eighteen thousand dollars, conditioned for the faithful performance of the trust reposed in him by the said decree, or which might, by the further order or decree of the said Court in the premises be reposed in him.

Thereupon, on the day and at the place aforesaid, the said defendant Thomas E. Waggaman, by the name of Thos. E. Waggaman, as principal, and the said defendant Daniel B. Clarke, by the name of Danl. B. Clarke, as surety, in accordance with the requirement of the said decree of the said Court and to the end that the said Thomas E. Waggaman might be qualified to act and should act as trustee to sell the said real estate, by their certain writing obligatory, sealed with their respective seals, and now shown to the Court, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, did acknowledge themselves, jointly and severally, to be held and firmly bound unto the United States of America in the sum of eighteen thousand dollars, to be paid to the said United States of America by the said defendants; to which said writing obligatory was attached and underwritten a certain condition to the effect that the said obligation should be void if

the said Thomas E. Waggaman, having been as aforesaid
3 appointed trustee to sell the said estate mentioned in the said proceedings in the said equity cause, should well and truly discharge his duties as such trustee and should in all things obey such order and decree as the said Court should make in the premises; which said writing obligatory was thereafter, to wit on the day and at the place aforesaid, filed by the said Thomas E. Waggaman with the clerk of the said Court and the same, and the surety named therein, were approved and accepted by the said Court and by Charles C. Cole, one of the justices of the said Court, as and for the bond so as aforesaid required by the said Court to be given in accordance with the decree aforesaid by the said Thomas E. Waggaman as trustee to sell the said real estate, which said writing obligatory, with the said condition thereunder written, is in words and figures and of the tenor following:

In the Supreme Court of the District of Columbia.

In Equity. No. 20225, Docket 46.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

Know all men by these presents, that we, Thomas E. Waggaman, principal, and Daniel B. Clarke, surety, all of the District of Columbia, acknowledged ourselves indebted to the United States of America in the penal sum of eighteen thousand dollars, for the payment of which we bind ourselves and every of our heirs, executors and administrators, jointly and severally, for and in the whole. Sealed with our seals, and dated this 7th day of July, A. D. 1899.

Whereas the said Thomas E. Waggaman has been duly appointed trustee to make sale of the real estate in the proceedings in this cause mentioned.

Now the condition of the above obligation is such, that if the above bounden Thomas E. Waggaman shall well and truly discharge the duties devolving upon him as such trustee and shall in all things obey such order and decree as this Court shall make in the premises, then the above obligation to be void and of no effect; else to be in full force and virtue.

THOS. E. WAGGAMAN. [SEAL.]
DANL. B. CLARKE. [SEAL.]

Witness:
W. P. BOTELER.

Approved this 7th day of July, 1899.
CHAS. C. COLE,
Asso. Justice S. C. D. C.

And the said plaintiff further says that the said defendant Thomas E. Waggaman, having been as aforesaid appointed trustee to make

sale of the real estate in the said proceedings in the said equity
4 cause mentioned, did not well and truly discharge the duties devolving upon him as such trustee and did not in all things obey such order and decree as the said Court made in the said premises, but the said defendant Thomas E. Waggaman did as such trustee act and conduct himself improperly, untruly and unfaithfully and did fail and refuse to obey a certain order and decree made by the Court in the premises, in this, namely:

That thereafter, to wit on the ninth day of July, 1899, the said Thomas E. Waggaman, having been as aforesaid appointed and constituted trustee to sell the real estate hereinbefore mentioned, and having, in accordance with the requirement of the said Court in the premises, executed and delivered and filed the said writing obligatory heretofore mentioned and set out, did enter upon and assume the duties of such trustee and did undertake and assume to act as such trustee and as such trustee to sell the said real estate in pursuance of and in accordance with the authority and provisions of the said decree hereinbefore mentioned and stated to have been passed by the said Court on the sixth day of July, 1899, and did as such trustee sell the said real estate for a certain price and did collect and receive from the purchaser of the said real estate the said price thereof, so that, by reason of the premises, thereafter, to wit on the 19th day of July, 1899, there came into and remained in the hands of the said defendant Thomas E. Waggaman, a large sum of money, that is to say the sum of eight thousand one hundred and forty-seven dollars and seventy-two cents, the said sum being the balance of the proceeds of the said sale so as aforesaid made by the said defendant and remaining in his hands after the payment from the said proceeds of all the necessary and proper expenses, costs and charges of the said sale, which said sum, being the balance of the said proceeds, it was and is the duty of the said defendant, as trustee aforesaid, to pay and deliver into the registry of the said Court; but the said defendant, Thomas E. Waggaman, did not pay and deliver, and has not paid and delivered, the said sum of money, or any part thereof, into the registry of the said Court or to any officer of the said Court or to any person authorized by the said Court to receive the same or any part thereof, but the said sum remains wholly unpaid and unaccounted for;

And the said plaintiff further says that, thereafter, to wit on the 21st day of November, 1905, the said Supreme Court of the District of Columbia holding an equity term, upon consideration of certain appropriate motions to that end made by divers parties to the said equity cause, did pass and enter in the said cause a certain decree, which said decree is in words and figures as follows:

5 In the Supreme Court of the District of Columbia.

In Equity. No. 20225.

MATTIE McC. HINE
vs.
ROBERT E. HINE ET AL.

This cause coming on again to be heard upon the motions heretofore filed by the complainant Mattie McC. Hine and the defendant Robert E. Hine by his next friend, for an order requiring Thomas E. Waggaman, trustee appointed herein by this Court, to pay into Court the sum of $8147.72, reported by the said trustee to be due from him, upon consideration of the said motions and of the answer made by the said trustee to the rule heretofore laid upon him to show cause why he should not pay the said sum, it is this 21st day of November, 1905, adjudged, ordered and decreed that the said Thomas E. Waggaman pay into the registry of this Court the said sum of $8147.72 with legal interest thereon from the 1st day of August 1904, within ten days from service of a copy of this order upon the solicitor of the said Thomas E. Waggaman.

WENDELL P. STAFFORD, *Justice.*

And thereafter, to wit on the 22nd day of November, 1899, a copy of the said decree was duly served upon one Irving Williamson, Esq., who was then and had been the solicitor in the said cause of the said defendant Thomas E. Waggaman, and who, as such solicitor, duly accepted such service of the said copy;

But, the plaintiff further says, the said defendant Thomas E. Waggaman, did not obey the said decree of the said Court, and did not pay and has not paid into the registry of the said Court the said sum of eight thousand one hundred and forty-seven dollars and seventy-two cents, or any part thereof, and did not pay and has not paid the said sum or any part thereof to any officer of the said court or to any other person authorized to receive the same, but to the present time has wholly failed and refused, and now doth fail and refuse, to pay the said sum or any part thereof in accordance with the said decree of the said Court passed in the said cause, although the said defendant has often been requested to pay the said sum.

And the said plaintiff further says that, thereafter, to wit on the 5th day of November, 1905, at the District of Columbia, the said defendant Daniel B. Clarke was by the said plaintiff, duly and fully informed of the premises and was by the said plaintiff requested to pay into the registry of the said Court the said sum of eight thousand one hundred and forty-seven dollars and seventy-two cents; but the said defendant Daniel B. Clarke refused so to pay the said sum or any part thereof, and still does refuse and has wholly failed to pay the said sum or any part thereof, and to the present time the

said defendants have not paid, nor has either of them paid,
6 the said sum or any part thereof into the registry of the said Court, or to any officer of the said Court, or to any other person authorized to receive the same, but the same remains wholly due and unpaid to the damage of the said plaintiff in the sum of eighteen thousand dollars; and the said plaintiff claims on account thereof the sum of eighteen thousand dollars, with legal interest thereon from the 19th day of July, 1899, together with the costs of this suit.

WM. H. ROBESON,
CHARLES A. KEIGWIN,
Attorneys for Plaintiff.

Rule to Plead.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

WM. H. ROBESON,
C. A. KEIGWIN,
Attorneys for Plaintiff.

In the Supreme Court of the District of Columbia.

At Law. No. —.

THE UNITED STATES OF AMERICA to the use of MATTIE McC. HINE and ROBERT E. HINE, Plaintiff,
vs.
THOMAS E. WAGGAMAN and DANIEL B. CLARKE, Defendants.

DISTRICT OF COLUMBIA, *City of Washington, ss:*

Before me personally appeared Charles A. Keigwin, who, being first duly sworn, deposed and on his oath said:

That he is one of the attorneys for Mattie McC. Hine and Robert E. Hine above named, and as such attorney for the United States of America named as plaintiff in the foregoing caption and in the declaration hereto attached and prepared to be filed in the above entitled cause, and as such attorney and agent makes this affidavit:

That the said plaintiff's cause of action herein arises upon a certain bond, executed by the above named defendant Thomas E. Waggaman as principal, and by the above named Daniel B. Clarke as surety, and filed by the said defendants in the office of the Clerk of the Supreme Court of the District of Columbia, which said bond bears date of the seventh day of July in the year 1899, and runs to and in favor of the United States of America, plaintiff herein, and is copied and set out in the said foregoing declaration, and which said bond, as affiant is informed and believes and expects to prove at the trial of this cause, was executed and filed by the said defendants, and was accepted and approved by the said Court, in pursuance

and execution of a certain decree of the said Court which had
7 been passed by the said Court on the sixth day of July, 1899,
in a certain equity cause then pending in the said Court and known and designated as number 20,225, on the equity docket of the said Court, in which cause the hereinabove named Mattie McC. Hine was complainant and the hereinabove named Robert E. Hine and other persons were defendants;

That, as appears by the record of the said equity cause now remaining upon the files of the said Court, and as this affiant expects to prove at the trial of this cause, in and by the bill of complaint filed in the said cause by the said Mattie McC. Hine as complainant, the said Mattie McC. Hine sought and prayed the said Court to decree the sale of a certain parcel of real estate lying within the *the* District of Columbia and within the jurisdiction of the said Court and mentioned and identified in the said bill, in which real estate she, the said complainant, and the said Robert E. Hine and other persons made parties defendant to the said bill had, or were supposed to have, certain interests, which interests were fully stated and set out in the said bill of complaint; that, after the filing of the said bill and in pursuance of the same, such proceedings were had in the said cause that on the 6th day of July, 1899, the said Court passed the decree hereinbefore mentioned, in and by which decree the said Court, agreeably to the prayer of the said bill of complaint, and upon testimony duly taken and by the said Court considered, did adjudge, order and decree that the said real estate mentioned in the said bill should be sold and the proceeds of such sale should be returned into the registry of the said Court; and the said Court, at the same time and in and by the same decree, did appoint and constitute the defendant Thomas E. Waggaman sole trustee for the purpose of making such sale so decreed and of executing the said decree, requiring and providing that the said Waggaman, before proceeding to act as such trustee, should file with the clerk of the said Court a bond, to be executed by him, the said Waggaman, with a surety or sureties to be approved by the said Court, or by one of the justices thereof, in the penalty of eighteen thousand dollars, conditioned for the faithful performance of the trust reposed in him by the said decree or which might, by the further order or decree of the said Court, be reposed in him;

That, thereafter, that is to say, on or about the 7th day of July, 1899, the said defendant Thomas E. Waggaman, as principal, and the defendant Daniel B. Clarke, as surety, did execute and seal the said bond hereinbefore mentioned, being the same bond alleged, copied and set out in the declaration hereto attached, by which the said defendants acknowledged themselves jointly and severally to be indebted unto the United States of America in the penal sum of eighteen thousand dollars, to be paid to the said United States of America by the said defendants, the said bond being by the terms thereof conditioned to be void if the said Thomas E. Waggaman, having been appointed trustee to make sale of the real estate mentioned in the proceedings in the equity cause hereinbefore mentioned, as was in the said bond recited, should well and

truly discharge the duties devolving upon him as such trustee
8 and should in all things obey such order and decree as the said Court should make in the premises, and else to be in full force and virtue, all of which will more fully and at large appear from the copy of the said bond which is included in the said declaration, to which reference is made and which it is prayed may be read with and taken as a part of this affidavit;

That the said bond was executed and sealed by the said defendants, and was by the defendant Thomas E. Waggaman filed with the Clerk of the Supreme Court of the District of Columbia and offered to the said Court for approval, all in accordance with the requirements of the aforesaid decree of the said Court passed on the 6th day of July, 1899, and to the end that the said Thomas E. Waggaman might be qualified to act and should act as sole trustee to sell the real estate in the said decree mentioned and directed to be sold; and the said bond, having been so executed, filed and offered for approval, was on the 7th day of July, 1899, approved and accepted by the said Court as and for the bond required by the said decree to be given;

That, thereafter, that is to say in the said month of July 1899, the said defendant Thomas E. Waggaman, having as aforesaid in accordance with the said decree of the said Court, qualified as trustee to sell the said real estate, did enter upon and assume the duties of such trustee, and as such trustee did sell the said real estate for the price of $8500, which sale was approved and finally ratified by an order of the said Court passed in the said equity cause on the 22d day of August, 1899; whereupon and in consequence of the premises, the said Waggaman received as trustee, the said sum of $8500; that, of the said sum, after the payment of all proper expenses and charges on account of the making of the said sale, there remained in the hands of the said Waggaman, as such trustee, a balance of $8147.72, for which he was and is accountable, as appears from a certain report signed and sworn to by the said Waggaman and filed in the said equity cause;

That the said Waggaman did not pay, and until the present time, did not pay and has not paid the said balance or any part thereof into the registry of the said Court, or to any officer of the said Court, or to any other person authorized by the said Court to receive the same, but retained the same in his own hands;

That, as appears from the record of the said cause, afterwards that is to say on the 21st day of November, 1905, by a decree passed on that day in the said equity cause, the said Supreme Court of the District of Columbia, did require the said Waggaman to pay into the registry of the said Court the said sum of $8147.72 with legal interest thereon from the 1st day of August, 1904, within ten days from service of a copy of the said decree upon the solicitor of the said Waggaman: that due service of a copy of the said decree was on November 22, 1905, made upon one Irving Williamson, who was and had been solicitor of record for the said Waggaman in the said cause, and who as such solicitor accepted such service; but, although more than ten days have elapsed since such service, the said

Waggaman has not paid the said sum or any part thereof into
9 the registry of the said Court or to any officer of the said Court or to any other person authorized to receive such payment;

And this affiant further says that, after the facts herein set out and after the date last mentioned, the said defendant Daniel B. Clarke was informed of the premises, and particularly, of the said last mentioned decree of the said Court, and was requested by the hereinabove named Mattie McC. Hine and Robert E. Hine, through their attorneys, to pay into the registry of the said Court the said sum of $8147.72, but this the said Daniel B. Clarke refused to, and he has not paid the said sum or any part thereof into the registry of the said Court or to any officer of the said Court, or to any other person authorized to receive such payment, and the same remains wholly due and unpaid.

And the affiant says that, by reason of the premises there is justly due to the said plaintiffs the sum of $8147.72, with interest thereon from the first day of August, 1904, exclusive of all set-offs and just grounds of defense.

C. A. KEIGWIN.

Subscribed and sworn to before me this 5" day of March, 1906.

JOHN R. YOUNG, *Clerk.*

Memorandum.

March 5, 1906.—Summons issued. Returned served defendant Clarke March 5, 1906. Defendant Waggaman "not to be found."

Pleas.

Filed March 27, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48380.

THE UNITED STATES OF AMERICA for the use of MATTIE McC. HINE and of ROBERT E. HINE, Plaintiff,

vs.

THOMAS E. WAGGAMAN and DANIEL B. CLARKE, Defendants.

I. *To the First Breach in the Declaration Assigned.*

1. In bar of any recovery, in this action, by the plaintiff upon the first breach in the Declaration assigned, for or in respect of any supposed interest, benefit, or behoof of the said Robert E. Hine, one of the persons at whose instance, and for whose use, the plaintiff hath in the Declaration against this defendant complained, this defendant saith:

That, before any of the times in the Declaration mentioned, to wit, on the 27th day of June, 1895, one Robert B. Hine had departed this life, in fact, seized and possessed, in fee simple, of divers valuable pieces or parcels of improved real property, yielding rent, situate in the City of Washington, in the District of Columbia, and amongst such pieces or parcels, of a certain Lot numbered 32, in one Shepherd's subdivision of Square 164, improved by a certain brick dwelling, and known as premises No. 1712 L Street, northwest, and leaving, as his widow, one Mattie McC. Hine, and as his only son and descendant, Robert Edward Hine, then but five years of age, and of whom the said Mattie McC. was mother, and leaving, also, a certain Last Will and Testament, whereby the said Robert B. in fact, devised all of the said pieces or parcels of improved realty, unto the said Mattie McC., for life, but expressly charged, in her hands, with insurance and repairs and unto the said Robert Edward, after her death, with certain limitations over, in favor of third persons, in case the said Robert Edward should be deceased, at the time of any the remarriage of the said Mattie McC., a true and certified copy of which said Last Will and Testament is here shown to the court, and now, in this Plea, at this particular place thereof, by reference, incorporated, though, for convenience, in fact, only filed with these Pleas, and marked A;

That the said Mattie McC. is one of the persons, and the said Robert Edward, the other of the persons at whose instance and for whose use, the Plaintiff is alleged in the Declaration to bring the present action;

That, on the 6th day of March, 1899, and while all of the said pieces or parcels of improved real property were still yielding rent, and remained, in fact, vested in the said Mattie McC. and the said Robert Edward, under and according to the terms and effect of the said Last Will and Testament, and not otherwise, the said Mattie McC. filed, in the Supreme Court of the District of Columbia, against the said Robert Edward, and against such third persons aforesaid her certain bill in equity, praying a decree for the sale of the said Lot numbered 32 in the said subdivision of square numbered 164, and, in fact, in effect, alleging as grounds for such decree, that the said Robert B. had died seized and possessed of the said Lot, as aforesaid, and leaving the said Last Will and Testament, whereby he had devised all of his real estate, unto the said Mattie McC., his widow, who was still unmarried, for her life, with remainder over, after her death, unto the said Robert Edward, his only child and descendant, who was now but nine years of age, and with subsequent limitations over, unto certain other persons, in case the said Robert Edward should be deceased, at the time of any the remarriage of the said Mattie McC.; that the said dwelling house upon the said Lot had been constructed some years prior to the filing of the said bill, and was not only deteriorating, for want of repairs, but remained at times, unproductive, for want of tenants; that, after deducting the expenses of taxes and repairs, the returns from the said improved Lot had become very inconsiderable; that when the said life estate of the said complainant should fall in, the said improved Lot must,

in the natural course of events, possess but small value to the remainderman, or to those who, in case of his decease, would
11 become interested in the said Lot, and be worth much less than the amount presently obtainable for the said Lot, if sold under the said decree in the said bill prayed; that the sum of $8,000 could then be obtained for the said Lot, if so sold; that a decree for the sale of the said Lot, under section 973 of the Revised Statutes of the United States, relating to the said District, would not only add to the income of the said complainant, and enable her the better to provide for the said Robert Edward, during his minority, but would place, at the determination of the life of the said complainant, in the hands of the said Robert Edward, or in those of such as, in case of his decrease, might be interested in the said Lot, a much larger sum than could be obtained for the said premises, at the period when the said life estate of the said complainant should become extinct; and that, in fine a sale of the said lot, under the said decree in the said bill prayed, had become absolutely necessary in the interest of all directly or indirectly in the said Lot concerned;

That, thereafter, in the cause purported to be commenced by the filing of the said bill in equity, to wit, on the 6th day of July, 1899, the Honorable Charles C. Cole, then one of the Associate Justices of the said Court, and in that character then assuming to act, did, in fact, sign a certain paper writing purporting to be the act of the said court, and further, also, in fact, purporting as follows: to adjudge the sale, as well as the expediency of the sale, of the said improved Lot, under the prayer and allegations in the said bill in equity contained; to appoint Thomas E. Waggaman, (one of the defendants in the present action), trustee to make such sale; to divest the titles in the said Lot, of all of the parties to the said cause so purported to be commenced, from and out of the said parties, and to vest the said titles in him, the said Thomas E. for the purpose of making such sale of the said Lot, and for the purpose of executing a conveyance therefor; to direct the said Thomas E., upon such sale by him made of the said Lot, to return the proceeds of such sale into the said court, to be, under the direction of the said court, disposed of; and to require the said Thomas E. to execute unto the United States of America, Bond, with surety or sureties to be approved by the said court, in the penalty of $18,000, conditioned for the faithful performance by the said Thomas E., as well of the duties in him purported to be reposed, in and by the said paper writing, so signed as aforesaid, as of such duties as might in him be thereafter purported, to be reposed, in and by any further paper writing purporting to be a decree or order in the cause aforesaid;

That, thereafter, on the 7th day of July, 1899, there was, in fact, executed and delivered, by the said Thomas E., as principal, and by this defendant, as his surety, a certain supposed instrument of writing, in fact, purporting to be a Bond unto the United States of America, in the penal sum of $18,000, conditioned for the faithful performance by the said Thomas E. of all and singular the supposed duties in the said paper writing referred to; and that the said sup-

posed instrument of writing was, thereafter, on the day and year last above mentioned, by the said Honorable Charles C. Cole,
12 still such Associate Justice, and so assuming to act as aforesaid, in fact, approved.

And that, assuming to act as trustee, under color of the said paper writing, so signed on the 6th day of July, 1899, the said Thomas E., thereafter, to wit, shortly after the 22nd day of August, 1899, in fact, sold the said Lot, so improved as aforesaid, for the sum of $8500, and the same in fact received from the purchaser, and that, after the said Thomas E. had deducted from the said proceeds of sale, the sum of $352.82, for costs and expenses in said latter sum by him, in fact, paid, in connection with the said suit, and with such sale, there remained, thereafter, to wit; on the 31st day of August, 1899, in the hands of him, the said Thomas E. assuming to act as trustee under color aforesaid, the sum of $8147.72.

Which said bill in equity, and all of which said matters above recited as thereunder occurring, after the filing of the said bill in equity, will more fully and at large appear, from the record and proceedings, in fact, in the supposed cause so commenced by the filing of the said bill, a duly certified transcript, in fact, of which said record and proceedings, in fact, is here shown to the court, and, now, in this Plea, at this particular place thereof, by reference, incorporated, as if there *in extenso* inserted, but, for convenience, in fact, only filed with these Pleas, and marked B.

And this defendant says, that the said bill in equity, the said paper writing, so signed on the 6th day of July, 1899; the said supposed instrument of writing, so as aforesaid, in fact, executed, on the 7th day of July, 1899, and so, aforesaid, in fact, approved, the said sale so in fact made as aforesaid, and the said sum of $8,147.72, are the supposed bill of complaint, the supposed decree passed on the 6th day of July, 1899, the supposed writing obligatory, and the supposed approval thereof, and the same sum of money, alleged in the declaration, in connection with the first breach therein assigned.

And this, this defendant is ready to verify, by the record in the said transcript contained.

2. In bar of any recovery, in this action, by the plaintiff, upon the first breach in the Declaration assigned, for or in respect of any supposed interests, benefit or behoof of the said Mattie McC. Hine, the other of the persons at whose instance, and for whose use, the plaintiff hath in the Declaration, against this defendant complained, this defendant saith:

(*a.*) That this defendant here repleads his Plea above, addressed to any recovery by the plaintiff, upon the said breach, for or in respect of any supposed interest, benefit or behoof of the said Robert E. Hine; and

(*b.*) That, after the death of the said Robert B., so seized and possessed, and leaving the said widow and the said only child and descendant; and leaving, also, the said Last Will and Testament, all as in the first plea above of this defendant recited; and after the filing by the said Mattie McC. of her said bill in equity; and after the signing by the Honorable Charles C. Cole, of the said paper writing

bearing date the 6th day of July, 1899; and after the execution and delivery, in fact, on the 7th day of July, 1899, by the said
13 Thomas E., as principal, and by this defendant, as his surety, of the said supposed Bond, and after the said approval, in fact of said supposed Bond; and after the said Thomas E., so assuming to act as trustee, under color of the said paper writing, in fact, so signed on the 6th day of July, 1899, had made sale in fact, of the said improved Lot, and received the proceeds of said sale, all as in the said first plea of this defendant recited, there remained, on the 31st day of August, 1899, in the hands of the said Thomas E., so assuming to act, of the proceeds of the said sale, in fact, the sum of $8147.74, in the Declaration mentioned; that, while the said sum of money so remained in the hands of the said Thomas E., so assuming to act, and before the said Thomas E. had made return or report of the said sum of money into or unto the said court, the said Mattie McC., on the 31st day of August, 1899, claiming to be the beneficiary, for life, of the income from the said sum of money derivable, entered, without the knowledge or assent of this defendant, into a certain arrangement with the said Thomas E., whereby the said Thomas E., without the knowledge or assent of this defendant, was to continue to retain in his hands, the said sum of money, without returning or reporting the same into or unto the said court, and whereby the said Thomas E. was, without the knowledge or assent of this defendant, to pay unto the said Mattie McC., quarterly interest upon the said sum of money, while so by him continued to be retained, without return or report thereof into or unto the said court, at the rate of five per centum per annum, such interest, on, as well as long before and long after, the date last aforesaid, being superior, both in rate and frequency of payment, to the interest, upon good security, during like periods, in general, in the said District obtainable; that, under and in pursuance of the said arrangement, the said Thomas E. did, in fact, without the knowledge or assent of this defendant, pay unto the said Mattie McC. quarterly interest upon the said sum of money, at the rate of five per centum per annum, from the 31st day of August, 1899, to and until the 1st day of May, 1904; that, under and in pursuance of the said arrangement, the said Thomas E., without the knowledge or assent of this defendant, did, in fact, continue to retain in his hands, the said sum of money, without making any return or report thereof into or unto the said court, through several successive years, commencing from and after the 31st day of August, 1899; and, that while the said sum of money was by the said Thomas E. Waggaman so retained in his hands, under and in pursuance of the said arrangement, without return or report by the said Thomas E. of the said sum of money into or unto the said court, the said sum of money, without the knowledge or assent of this defendant, was, by the said Thomas E., prior to the 26th day of September, 1904, for his own use, expended; that, on the 23rd day of August, 1904, petitions in bankruptcy were filed, in the said court, against the said Thomas E.; that, on the 26th day of September, 1904, the said Thomas E. was, in the said court, adjudged a bankrupt; that the said Thomas E. hath not in the said

court received his discharge in bankruptcy; and that the said
14 sum of money is now, and since the day and year last aforesaid, hath been in fact, irrecoverable either from the said Thomas E. or from his estate. And this, the defendant is ready to verify.

II. *To the Second Breach in the Declaration Assigned.*

1. And in bar of any recovery, in this action, by the plaintiff, upon the second breach in the Declaration assigned, for or in respect of any supposed interest, benefit or behoof, of the said Robert E. Hine, one of the persons at whose instance, and for whose use, the plaintiff hath in the Declaration against this defendant complained, this defendant saith:

That the said sum of $8,147.72, mentioned in the supposed decree, bearing date the 21st day of November, 1904, and described in the second breach in the declaration assigned, is the same sum of money which is mentioned in the first plea of this defendant to the first breach of the Declaration, as remaining, and, in fact, remaining, in the hands of the said Thomas E., assuming to act as trustee aforesaid, after the sale, in fact, of the said improved Lot, made by the said Thomas E., under color of the said paper writing, so signed by the Honorable Charles C. Cole, bearing date the 6th day of July, 1899, and purporting to decree the sale of the said improved lot, under the prayer and allegations contained in the said bill in equity, set forth in the said first plea of this defendant to the said first breach, as by the said transcript, marked B, mentioned in the said plea, and here shown to the court, will more fully and at large appear.

And this, this defendant is ready to verify, by the record in the said transcript contained.

2. And, in bar to any recovery, in this action, by the plaintiff, upon the second breach in the Declaration assigned, for or in respect of any supposed interest, benefit, or behoof of the said Mattie McC. Hine, the other of the persons at whose instance, and for whose use, the plaintiff hath in the Declaration against this defendant complained, this defendant saith:

(*a.*) That this defendant here repleads his above plea addressed to any recovery by the plaintiff, upon the second breach in the Declaration assigned, for or in respect of any supposed interest, benefit or behoof of the said Robert E. Hine; and.

(*b.*) For further plea, that the said sum of $8,147.72 mentioned in the supposed decree, bearing date the 21st day of November, 1905, and described in the second breach in the Declaration assigned, was and is the same sum of money which, while, without the knowledge or assent of this defendant, retained by the said Thomas E., without return or report thereof into or unto the said court, but with payment of interest as aforesaid, under the said arrangement made by the said Mattie McC., with the said Thomas E., was, without the knowledge or assent of this defendant, for his own use, by the said Thomas E., thereafter expended, and which is now, and since the

26th day of September, 1904, hath remained, irrecoverable
15 from the said Thomas E., or his estate, all as hereinbefore particularly averred, in the second plea by this defendant, as to the interest of the said Mattie McC., addressed to the first breach in the Declaration assigned.

And this, this defendant is ready to verify.

JOHN SELDEN, *Attorney,*
For DANIEL B. CLARKE, *D'f't.*

CITY OF WASHINGTON, *District of Columbia, ss:*

I, Daniel B. Clarke, of the City of Washington, in the District of Columbia, being first duly sworn, depose and say:

That affiant is one of the defendants in the action wherein the above Pleas are entitled, and the defendant in whose behalf the said Pleas are drawn, and are shortly in said action to be filed;

That affiant denies the right of the plaintiff in the said action, to recover against this affiant the whole, or any part, of the sum of money in the Declaration of the plaintiff demanded;

Affiant is informed and verily believes,

That one Robert B. Hine departed this life, in the year 1895, seized and possessed, in fee simple, of divers pieces of valuable improved real estate in the said City, yielding rent, leaving the certain Last Will and Testament in the said Pleas mentioned, and leaving, as his Widow, Mattie McC. Hine, one of the persons in the Declaration mentioned, and who hath never remarried, and the said Robert E. Hine, another of the persons in the Declaration mentioned, then but five years of age, as his only son and descendant.

That, thereafter, on March 6, 1899, and while all of the said pieces of real estate were still yielding rent, and continued to be held, both by the said Mattie McC. and the said Robert E., by no other right or title than such as had been by the said Last Will and Testament created, the said Mattie McC., for the sale of one of the said pieces of real estate, filed the certain bill in equity set forth in the certified transcript of the record in the said Pleas mentioned, and on July 6, 1899, obtained a decree, purporting to adjudge a sale of the said piece of real estate, and to appoint one Thomas E. Waggaman, now, in the present action, co-defendant with this affiant, trustee to make such sale, upon the Bond, under the duties, and with the title, all as in said decree, as the same is set forth in said transcript, at large appears;

Affiant admits, that, as surety for the said Thomas E., affiant, in fact, executed the Bond shown in the said transcript, but he declares, that he did so, without consideration, at the request of, from motives of friendship and accommodation toward, the said Thomas E., and with no other notice or information, in fact, of the nature of the cause wherein such Bond was required, than upon the face of the said Bond appeared, and without any actual notice or suspicion of any fact or circumstance tending to indicate the sale which the said Thomas E., was so appointed trustee to make, was in anywise forbidden or unauthorized by law; that affiant would never have consented to become surety upon the said Bond had he, at any time before

his execution thereof, had reason to conceive or imagine, that the said decree, or the said Bond, or the cause wherein the said
16 decree had been passed and the said Bond given, was open to any exception whatever, either in law, or in fact; that, after proceedings in bankruptcy had been commenced against the said Thomas E., as hereinafter related, affiant became threatened with various liabilities arising out of the confidence which affiant had reposed in the said Thomas E., long prior to the commencement of such proceedings, and, from apprehensions in respect of said liabilities, sought the advice of a gentleman of the bar, upon such the liabilities of affiant, in general, and was, on November 17, 1904, by the said gentleman informed and advised, that, in the opinion of the latter the said Bond was given for the accomplishment of an illegal end and object; that the said court was possessed of no jurisdiction in the said cause, and that all proceedings in the said cause, including the said Bond, were, as to this affiant, null and void; and until so informed and advised, at the time, and in the manner, aforesaid, affiant had no reason to conceive or imagine that the said decree, or the said Bond, or the said cause, or any proceeding therein had, was open to any objection or criticism in law or in fact, whatsoever.

That since being so informed and advised, as aforesaid, affiant hath verily believed, and still verily believes, that said Bond, was given for the accomplishment of an illegal end and object; that the said court was possessed of no jurisdiction in or over the said cause, and that all proceedings in the said cause, including the said Bond, were, as to this affiant, null and void.

And affiant saith that such illegality and nullity aforesaid, and such said want of jurisdiction, constitute part of the grounds of the defence of affiant to the present action.

And affiant further saith, that affiant is informed and verily believes, that, after the passage of the said decree, bearing date the 6th day of July, 1899, the said Thomas E., in fact, assuming to act as trustee, under said decree, made sale, in fact, of the property in the said decree mentioned, and shortly after the 22nd day of August, 1899, in fact, received the proceeds of the said sale; that, the said Thomas E., from and out of the said proceeds of sale, thereafter deducted certain costs and expenses by him, while so assuming to act as aforesaid, in fact, paid in connection with the said cause and with the said sale; and that, of the proceeds of the said sale, there remained, after such deduction, on the 31st day of August, 1899, in the hands of the said Thomas E., so assuming to act as such trustee, the sum and balance of $8,147.72; that, on the day and year last aforesaid, while the said sum of $8,147.72, so remained in the hands of the said Thomas E., and before the said Thomas E. had made return or report of the said sum of money into or unto the said court, the said Mattie McC. Hine, claiming to be entitled to the income, for her life, upon the said sum of money, without the knowledge or assent of affiant, entered into a certain arrangement with the said Thomas E., who then was and long before had been, and long thereafter remained, a real estate agent and broker, and who, as such, had

been by the said Mattie McC., both before and after the date
17 last aforesaid, frequently, in her concerns employed, whereby the said Thomas E., without the knowledge or assent of affiant, was to continue to retain in his hands the said sum of money, without returning or reporting the same into or unto the said court, and whereby the said Thomas E., without the knowledge or assent of affiant, was, while so continuing to retain in his hands the said sum of money, without returning or reporting the same into or unto the said court, to pay unto the said Mattie McC., quarterly interest upon the said sum of money, at the rate of five per centum per annum; that such interest was, on the day and year last aforesaid, and long theretofore had been, and long thereafter remained, superior, both in rate and frequency of payment, to the interest, during like periods, in the said District, upon good security, in general, obtainable; that, under and in pursuance of the said arrangement, the said Thomas E., without the knowledge or assent of affiant, did, in fact, pay unto the said Mattie McC., quarterly interest upon the said sum of money, at the rate of five per centum per annum, from the 31st day of August, 1899, to and until the 1st day of May, 1904; that, under and in pursuance of the said arrangement, the said Thomas E., without the knowledge or assent of affiant, did, in fact, continue to retain in his hands the said sum of money, without making return or report thereof into or unto the said court, from the 31st day of August, 1899 to and until the end of the last of several successive years thereafter; that, while the said sum of money was by the said Thomas E., under and in pursuance of the said arrangement, so retained in his hands, without return or report, as aforesaid, the said sum of money, without the knowledge or assent of affiant, was by the said Thomas E., prior to the 26th day of September, 1904, for his own use expended; that, on the 23rd day of August, 1904, petitions in bankruptcy were filed in the said court, against the said Thomas E., that, on the 26th day of September, 1904, the said Thomas E., was, in the said court, adjudged a bankrupt; that the said Thomas E. hath received no discharge from the said court; that the said sum of money hath been, since the day and year last above, and yet remains, irrecoverable either from the said Thomas E., or from his estate; and that of such said arrangement made by the said Mattie McC., with the said Thomas E., or of such retention, thereunder, of the said sum of money, or of such payment of interest, thereunder, by the said Thomas E., or of such expenditure of the said sum of money by the said Thomas E., for his own use, affiant had no notice, intimation or suspicion, until after affiant, subsequently to the said adjudication of the said Thomas E., as a bankrupt, had sought the advice of counsel as, and under the circumstances, hereinbefore related.

And affiant is informed and verily believes, and it is part of his defence, in the present action, that, even if affiant were originally liable upon the said Bond, affiant, by reason of such the acts, doings and transactions of the said Mattie McC. with the said Thomas E. of and concerning the said sum of money, became and was dis-

18 charged, prior to the 26th day of September, 1904, from all liability upon the said Bond, as to any interest of the said Mattie McC. either in the penalty or condition of the said Bond.

DAN'L B. CLARKE.

Subscribed and sworn, in the District of Columbia, before me, a Notary Public therein, by the above Daniel B. Clarke, this 26th day of March, 1906.

[SEAL.] WM. P. YOUNG,
Notary Public in and for the District of Columbia.

EXHIBIT "A."

Filed March 27, 1906.

Last Will and Testament of Robert B. Hine, Ch'f Eng'r U. S. N.

In the Name of God, Amen.

I, Robert B. Hine of Washington, D. C., being of sound mind, memory and understanding, considering the certainty of death, and the uncertainty of the time thereof, and being desirous to settle my worldly affairs, and thereby be the better prepared to leave this world, when it shall please the Almighty to call me hence, do therefore make and publish this my last Will and Testament, in manner and form following, that is to say:

First, and principally, I commit my soul into the hands of Almighty God, and my body to the earth, to be decently buried at the discretion of my executrix hereinafter named; and my Will is, that all my just debts and funeral expenses shall be paid out of my estate, as soon after my decease as shall be found convenient.

Second. I give, devise and bequeath to my dear wife, Mattie McC. Hine, all my personal property, money on hand or in bank, or due me by the U. S. Government as balance of pay, excepting such notes secured by deeds of trust as I may die possessed of. And I desire my said wife, who will be sole executrix, to keep my watches and chains until my dear son Robert Edward, is able to take proper care of them, and then give them to him, and also to give to my friend, E. R. Pelton, as souvenirs, my Japanese bronze sleeve buttons, and my scarf pin which is set with an oriental topaz. I direct my executrix to apply the proceeds of the deed of trust notes of which I may die possessed, to the payment of the debt on my house. No. 1825—19th St. N. W. Washington, D. C. If the proceeds of these notes, should not be sufficient to pay the debt alluded to, I direct my executrix to make up the sum required from the "Royal Arcanum" insurance money, which she will receive when due. And I give and bequeath, from the insurance money, the (2) sum of one hundred pounds sterling (£100) to my father Rev. Henry Hine, if he survives me. If not the sum is to go — my mother, Amelia B. Hine, if she survives me, should she not survive me, the sum is to go to

my sister, Amelia B. Hine. These three are now living at
19 Boston Spa. Yorkshire England. I give and bequeath to my dear wife, Mattie McC. Hine, a life interest in all my real estate. As executrix she will collect the income arising from said real estate, and after paying all necessary expenses of collection, fire insurance and repairs, shall retain the remainder of the income for her own use. After the death of my said wife, I give and bequeath my real estate to my son, Robert Edward, and any other children that may hereafter be born to me. If my said wife should marry again, she will from the date of such remarriage, be entitled to retain for her own use, one half of the net income of my estate, and will pay the remainder to a trustee for my son, and any other children who may hereafter be borne to me.

Provided further, that should my wife marry again, and should no child of mine by her, be then surviving, the whole net income from my estate shall be retained by her, during her life, and after her death, my real estate shall be sold, and of the proceeds, one third shall be paid to my father, the Rev. Henry Hine now of Boston Spa. Yorkshire England, if he then be living, he not being then living to my mother Amelia Burnett Hine, neither of them being then living, to my sister, Amelia Burnett Hine, and the residue, shall be equally divided between my brothers and sisters share and share alike. If neither parent, nor my sister Amelia Burnett Hine outlives my *said wife*, then the whole net proceeds of the sale of my real estate, shall be equally divided, between my brothers and sisters. Should any of these have died, before this distribution, takes place, their surviving children shall receive the share of the deceased parent, share and share alike.

And I do devise and bequeath all the rest and residue of my estate, both real, personal and mixed to be equally divided among my ..... and ..... in equal portions, to them and their heirs and assigns forever, share and share alike, as tenants in common.

And Lastly, I do hereby constitute and appoint my dear wife Mattie McC-Hine executrix of this my las- Will and Testament, and I desire that my executrix hereinbefore named shall not be required to give bond for the performance of the duties of that office. Further, it is my will and desire that the aforegoing devises of this Will shall operate upon and pass all real estate hereafter acquired and owned by me at the time of my death, and shall take effect as if made on the last day of my life; hereby revoking and annulling all former wills by me heretofore made, ratifying and confirming this and none other to be my last Will and Testament.

In Testimony Whereof, I have set my hand and seal to this, my last Will and Testament, at Washington, D. C. this 13th day of April in the year of our Lord one thousand eight hundred and ninety five Including the interlined words "said wife" on page No. 2.

ROBERT B. HINE. [SEAL.]

Signed and Sealed by the said Robert B. Hine in our presence, and by him published and declared as and for his last Will and

Testament, and at his request and in his presence, and in the
20 presence of each other, we hereunto subscribe our names as attesting witnesses, at Washington, D. C. this 13th day of April, A. D. 1895.

LELIA MEEM PEACHY,
Residence, 1823 19*th Street, Washington, D. C.*
SALLY CARY PEACHY,
Residence, 1823 19*th Street, Washington, D. C.*
CHAS. H. GREENLEAF,
Residence, Chelmsford, Mass.

Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

JULY 5TH, 1895.

DISTRICT OF COLUMBIA, *To wit:*

This day appeared Lelia Meem Peachy and Sally Cary Peachy, two of the subscribing witnesses to the foregoing last will and testament of Robert B. Hine, late of the District of Columbia, deceased, and severally made oath on the Holy Evangels of Almighty God, that they did see the Testator therein named sign this will; that he published, pronounced, and declared the same to be his last will and testament; that at the time of so doing he was, to the best of their apprehension, of sound and disposing mind, and capable of executing a valid deed or contract; and that their names as witnesses to the aforesaid will were signed in the presence and at the request of Testator and in the presence of the other subscribing witness thereto.

Test:

J. P. WRIGHT,
Register of Wills.

Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, Wm. C. Taylor, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify, That the foregoing is a true copy of the original will of Robert B. Hine, deceased, and the proof thereof, filed and recorded in the office of the Register of Wills for the District of Columbia, Clerk of the Probate Court, aforesaid; and that the said will after having been duly proven, as will appear by the proof hereto attached, was, by order of the said Court, in accordance with the laws of the District of Columbia, admitted to probate and record on the twelfth day of July, A. D. one thousand eight hundred and ninety-five.

I further certify, That I have compared the foregoing copy of said will, and the proof thereof, with the original record in said office, and find it to be a full, true and correct transcript thereof.

21 Witness my hand and the seal of the said Probate Court, this 7th day of March, A. D. 1906.

[SEAL.] WM. C. TAYLOR,
Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court.

EXHIBIT "B."

Filed March 27, 1906.

Bill of Complaint.

Filed March 6, 1899. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

Equity. No. 20225.

MATTIE McC. HINE
vs.

1, ROBERT EDWARD HINE; 2, AMELIA BURNETT HINE; 3, AMELIA BURNETT HINE, JR.; 4, FREDERICK HINE; 5, JAMES HINE; 6, HARRY HINE; 7, ELIZABETH HOWSE; 8, MARGARET LEIGH; 9, ROBERT B. HINE; 10, HARRY HINE; 11, WILLIAM HINE; 12, FRANK HINE; 13, CLINTON HINE; 14, ARTHUR HINE.

To the supreme court of the District of Columbia, holding an equity court for said District:

Complainant states as follows:

1. She is a resident of the City of Washington, District of Columbia and brings this suit in her own right. All of the defendants are sued in their own right, and all are of full age, except the one numbered in the Caption 1, who is nine years of age, and those numbered in the Caption 11, 12, 13 and 14, who are respectively aged 13, 9, 6 and 4 years. Said defendant numbered 1 is a resident of the District of Columbia, the defendants numbered 9 to 14, both inclusive are residents of Brooklyn, New York, those numbered 2 and 3 of Liverpool, England, those numbered 5 and 7 of South Africa, defendant numbered 6 of Australia, and defendant numbered 8 of Whitney, South Oxon, England.

2. Robert B. Hine, the husband of complainant, a citizen of the United States and a resident of the District of Columbia, died therein on June 27, 1895, seized in fee simple of a certain parcel of real estate in the City of Washington in said District known as lot numbered 32 in Alexander R. Shepherd's subdivision in square 164, as per plat recorded in Liber J. H. K. folio 137 of the Records of the Surveyor's Office of said District, improved by a brick dwelling. By his last will, executed to pass real estate, dated April 13, 1895, and duly admitted to probate and record in the Supreme Court of said

District, holding a special term for Orphans' Court business,
22 he devised all his real estate to the complainant for life, with remainder to his son, the defendant Robert Edward Hine, and any other children that might thereafter be born to said testator. Said will further provides that should complainant marry again and no child of the testator by her be surviving, then after her death his real estate be sold and one third of the proceeds be paid to his father Henry Hine, if he be then living, if not, to the testator's mother, defendant numbered 2, neither of those being living, to his sister, defendant numbered 3, and the residue to be equally divided between his brothers and sisters, share and share alike. Said will further directs that if neither of his parents, nor his said sister should outlive complainant, then the whole net proceeds of the sale of his real estate shall be equally divided between his brothers and sisters, surviving children to receive, share and share alike, the share of a deceased parent.

3. No other child was born to said testator and complainant has not re-married.

4. In addition to the sister mentioned in said will, said testator left two other sisters, defendants numbered 7 and 8, and three brothers, defendants numbered 4, 5, and 6. Another of his brothers, William Hine, died in Brooklyn, New York, May 29, 1895, leaving as his children and only heirs at law, defendants, numbered 9 to 14, both inclusive, and testator's said father, Henry Hine, died February 27, 1899.

5. The lot described in the second paragraph of the bill, is improved by a dwelling house which was built some time ago; said building is deteriorating in value each year and repairs must be made so as to keep the premises tenantable. These repairs diminish very largely the income from the property, and when loss of rent, during periods when the house is unoccupied, taxes, insurance premiums, are added, the returns from said real estate are inconsiderable and must continue to lessen, so that in the natural course of events, at the termination of complainant's life estate, the value of the property to the remaindermen, or to those who have an interest therein, contingent upon his death, would be very small, and much less than can now be obtained for it. Complainant has ascertained that at least $8,500. can be realized should a decree for the sale thereof be now made. And complainant avers that to obtain such a sum for the property and the investment thereof under the provisions of Section 973 of the Revised Statutes relating to the District of Columbia, will not only add to her income and enable her the better to provide for the remainderman during his minority, but will when he, or those having a contingent interest, take the fund, put into his or their possession a much larger sum than could by any possibility then be obtained for the property, so that a sale of said property is absolutely for the interests of all concerned, directly or indirectly.

6. Said will does not in any manner prohibit a sale of said real estate, indeed it contemplates such a disposition thereof.

23 *Prayers.*

Wherefore complainant prays as follows:

1. That a guardian *ad litem* may be appointed for the infant defendants hereinbefore designated.

2. That a decree may be passed for the sale of said property by a trustee to be appointed for that purpose, and that the proceeds thereof may be invested in pursuance of said Section 973 of said Recorded Statutes, and the income be paid to complainant during her life time, and thereafter said fund be disposed of in accordance with the provisions of said will.

3. That said will may be proved, and established by decree of this court.

4. That complainant may have such other and further relief as the case may require.

To which end complainant prays for process against the defendants named and numbered from 1 to 14 inclusive, in the Caption, as fully as though they were here again named.

MATTIE McC. HINE.

IRVING WILLIAMSON,
Sol'r for Compl't.

DISTRICT OF COLUMBIA, *ss:*

Mattie McC. Hine being duly sworn, deposes and says, that she is the complainant in the above bill, that she has read said bill of complaint and knows the contents thereof, and that the facts therein stated, of her personal knowledge are true, and those therein stated upon information and belief, she believes to be true.

MATTIE McC. HINE.

Subscribed and sworn to before me this 3d day of March, A. D. 1899.

W. CLARENCE DUVALL,
[NOTARIAL SEAL.] *Notary Public.*

24 *Subpœna to Answer.*

Issued March 6, 1899.

In the Supreme Court of the District of Columbia.

5848.

No. 20225. Equity Docket.

MATTIE McC. HINE, Complainant,
against
ROBERT EDWARD HINE ET AL., Defendants.

The President of the United States to, 1, Robert E. Hine; 2, Amelia B. Hine; 3, Amelia B. Hine, Jr.; 4, Frederick Hine; 5, James Hine; 6, Harry Hine; 7, Elizabeth Howse; 8, Margaret Leigh; 9, Robert R. Hine; 10, Harry Hine; 11, William Hine; 12, Frank Hine; 13, Clinton Hine; 14, Arthur Hine, defendants:

You are hereby commanded to appear in this Court, at its first Special Term, occurring ten days after service of this subpœna, and

answer the exigency of the original bill, under pain of attachment, and such other process of contempt as the Court shall award.

Witness, The Honorable Edward F. Bingham, Chief Justice of said Court, the 6th day of March, A. D. 1899.

[SEAL.]

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

MEMORANDUM.—That the defendant, herewith served, is to enter appearance in this suit, in the Clerk's Office, on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's Return.

Summoned the within named defendant No. 1 personally M'ch 22, 1899. All other within named defendants not to be found. April 4, 1899.

AULICK PALMER, *Marshal.*
B.

I. WILLIAMSON.

25 Filed April 27, 1899. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, the 26th Day of April, 1899.

No. 20225, Docket 46. Equity.

MATTIE MCC. HINE
vs.
ROBERT EDWARD HINE ET AL.

On motion of the plaintiff, by Mr. Irving Williamson her solicitor, it is ordered that the defendants, Amelia Burnett Hine, Amelia Burnett Hine, Jr., Frederick Hine, James Hine, Harry Hine, Elizabeth Howse, Margaret Leigh, Robert B. Hine, Harry Hine, William Hine, Frank Hine, Clinton Hine and Arthur Hine cause their appearance to be entered herein on or before the first rule-day occurring forty days after this day: otherwise the cause will be proceeded with as in case of default.

The object of this suit is to sell sub lot 32 in square 164, Washington, D. C., and reinvest proceeds.

This order to be published in the Washington Law Reporter and Evening Star once a week for three successive weeks.

By the Court,

W. S. COX, *Justice, &c.*

True Copy: Test:

Filed June 7, 1899. J. R. Young, Clerk.

Supreme Court, District of Columbia, this 18th Day of May, 1899.

Equity Court, No. 20225, Docket No. 46.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

Affidavit.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me a Notary Public in and for the said District, M. W. Moore, well known to me to be the Manager of "The Washington Law Reporter," a weekly newspaper printed and published in the City of Washington and District aforesaid, and made oath in due form of law that the annexed notice was published in said newspaper once a week for three successive weeks as per certificate in the margin hereto.

26 Witness my hand and official seal this 18th day of May, 1899.

FRED W. MOORE,
Notary Public, D. C.

[SEAL.]

Copy of Notice.

In the Supreme Court of the District of Columbia, the 27th Day of April, 1899.

No. 20255, Doc. 46. Eq.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

On motion of the plaintiff, by Mr. Irving Williamson, her solicitor, it is ordered that the defendants, Amelia Burnett Hine, Amelia Burnett Hine, Jr., Frederick Hine, James Hine, Harry Hine, Elizabeth Howse, Margaret Leigh, Robert B. Hine, Harry Hine, William Hine, Frank Hine, Clinton Hine, and Arthur Hine, cause their appearance to be entered herein on or before the first rule-day occurring forty days after this day; otherwise the cause will be proceeded with as in case of default.

The object of this suit is to sell sub lot 32, in Square 164, Washington, D. C. and reinvest proceeds.

This order to be published in The Washington Law Reporter and Evening Star once a week for three successive weeks.

By the Court:

W. S. COX, *Justice, &c.*

True Copy. Test:

J. R. YOUNG, *Clerk, &c.*,
By M. A. CLANCY, *Ass't Clerk.*

I hereby certify that the foregoing Legal Notice was printed and published in the regular issues of "The Washington Law Reporter," a weekly newspaper, bearing date, Apr. 27, May 4 & 11, 1899.

M. W. MOORE,
Gen. Manager of The Law Reporter Co.
of Washington City.

Filed June 7, 1899. J. R. Young, Clerk.

Certificate of Publication.

CITY AND COUNTY OF WASHINGTON, *District of Columbia, ss:*

On this fifth day of June A. D., one thousand eight hundred and ninety-nine personally appeared before me, Cornelius Eckhardt a Notary Public in and for the City and County aforesaid, F. B. Noyes, who, being duly sworn according to law, declares that he is one of the publishers of The Evening Star, a daily newspaper
27 published in this City and County of Washington, District of Columbia, and that the advertisement, of which the annexed is a true copy, was published on the following dates: April 29th, May 6th & 13th 1899, at a cost of Eight and 82/100 ($8.82) Dollars.

FRANK B. NOYES,
Publisher of The Evening Star.

Sworn and subscribed to before me this fifth day of June, A. D. eighteen hundred and ninety-nine.

CORNELIUS ECKHARDT,
[NOTARIAL SEAL.] *Notary Public.*

Filed April 27, 1899. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, the 27th Day of April, 1899.

No. 20225, Docket 46. Equity.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

On motion of the plaintiff, by Mr. Irving Williamson her solicitor, it is ordered that the defendants, Amelia Burnett Hine, Amelia Burnett Hine, Jr., Frederick Hine, Jarvis Hine, Harry Hine, Elizabeth Howse, Margaret Leigh, Robert B. Hine, Harry Hine, William Hine, Frank Hine, Clinton Hine and Arthur Hine, cause their appearance to be entered herein on or before the first rule-day occurring forty days after this day; otherwise the cause will be proceeded with as in case of default. The object of this suit is to sell sub lot 32, in square 164, Washington, D. C., and reinvest proceeds.

This order to be published in the Washington Law Reporter and Evening Star once a week for three successive weeks.

By the Court,

W. S. COX,
Justice, &c.

True Copy.
Test:

J. R. YOUNG, *Clerk, &c.*,
By M. A. CLANCY, *Ass't Clerk.*

ap 29-law-3t

28 *Affidavit of Irving Williamson, etc.*

Filed June 7, 1899. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

Equity. No. 20225.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

Irving Williamson being duly sworn deposes and says: That he is the solicitor for the complainant in the above-entitled cause. That on the 12th day of May 1899, he mailed postpaid, a printed copy of the order of publication, passed in the above-entitled cause, to each of the defendants named in the bill, except the defendant No. 1, directed to each of said defendants at his or her last known place of residence.

Subscribed and sworn to before me June 7th, 1899.

Decree Pro Confesso, etc.

Filed June 7, 1899. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

Equity. No. 20225.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

It appearing to the Court that the order of publication, passed herein on the 26th day of April, 1899 has been duly published in the Washington Law Reporter and Evening Star as therein directed, and by the affidavit of Irving Williamson, Solicitor for the complainant, that on May 12th last he mailed, post paid, a printed copy of the said order of publication to each of the defendants hereinafter named, directed to his or her last known place of residence, and no

appearance having been entered, or answer, plea or demurrer filed by or in behalf of either of said hereinafter named defendants; it is this 7th day of June, A. D. 1899, ordered by the court that Thomas E. Waggaman be and he is hereby appointed guardian *ad litem* for the infant defendants, William, Clinton, Frank and Arthur Hine, and it is further ordered and decreed by the court that the bill of complaint in this cause be and the same is hereby taken for confessed against the defendants Amelia Burnett Hine, Amelia Burnett Hine, Jr., Frederick Hine, James Hine, Harry Hine, Elizabeth Howse, Margaret Leigh, Robert B. Hine and Harry Hine.

W. S. COX, *J.*

29 *Order Appointing Guardian Ad Litem, etc.*

Filed June 8, 1899. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

Equity. No. 20225.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

It appearing to the court that the infant defendant Robert Edward Hine has been duly served with subpœna by the Marshal and is now present in open court, it is this 8th day of June, A. D. 1899, ordered by the court that Thomas E. Waggaman be and he is appointed guardian *ad litem* for said infant defendant.

CHAS. C. COLE,
Asso. Justice.

Answer of Infant Defendants by Guardian Ad Litem.

Filed June 21, 1899. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

Equity. No. 20225.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

The Answer of Robert Edward Hine, William Hine, Frank Hine, Clinton Hine, and Arthur Hine, Infants under the age of Twenty-one Years, to the Bill of Complaint of the Above-named Complainant.

These defendants can neither admit nor deny the matters and things alleged in the bill of complaint in this cause, and being in-

fants of tender years submit their rights to the protection of this Court.

THOS. E. WAGGAMAN,
Guardian Ad Litem.

DISTRICT OF COLUMBIA, *ss:*

I, Thomas E. Waggaman do solemnly swear that I have heard read the answer by me subscribed and know the contents thereof, and that the facts herein stated are true as I verily believe.

THOS. E. WAGGAMAN.

Subscribed and sworn to before me June 20, 1899.
[NOTARIAL SEAL.] CHARLES S. DRURY,
Notary Public, D. C.

Replication.

Filed June 21, 1899. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

Equity. No. 20225.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

The complainant hereby joins issue on the answer of the infant defendants.

I. WILLIAMSON,
Sol'r for Compl't.

Complainant's Depositions.

Filed June 27, 1899. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Eq. No. 20225.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

WEDNESDAY, *June* 21/99.

Present Mr. Williamson for Complainant, and Thomas E. Waggaman, Guardian *ad litem* for Robert E. Hine.

LELIA MEEM PEACHY, a witness of lawful age, produced, sworn and examined on behalf of the complainants deposed as follows:

By Mr. WILLIAMSON:

My name is Lelia Meem Peachy, I reside at 1820 19th Street, N. W. this city, I knew Robert B. Hine in his lifetime, I knew him

about four months, I am one of the witnesses to his will, my sister also witnessed it but she is not in town.

Q. Look at the paper I now show you, dated April 13th 1895, purporting to be the last will of Robert B. Hine and ask if you recognize his signature there? —. Yes, sir; that is his signature, he signed it in the presence of the three witnesses, and they signed in his presence and in the presence of each other, Sally Carrie
31 Peachy is my sister, the other witness Mr. Greenleaf is not a resident of the District. At the time Mr. Hine signed, he declared that to be his will and requested us three to witness it. At the time he executed that will he was of sound mind and capable of executing a valid deed or contract. The will was signed at his house No. 1825 19th Street this City. I know Mrs. Mattie McC. Hine, she is the widow of Robert B. Hine.

LELIA MEEM PEACHY.

Subscribed and sworn to before me this 21st day of June 1899.
JNO. E. McNALLY, *Examiner.*

ALLAN E. WILSON, a witness of lawful age being produced, sworn and examined on behalf of the Complainant deposed as follows:

By Mr. WILLIAMSON:

My name is Allan E. Wilson, I reside in this City. I am connected with the office of Register of Wills of the District of Columbia The will of Robert B. Hine, dated April 13th 1895, shown to the witness who has just testified is the original will produced by me from the files of the office of the Register of Wills. It was admitted to Probate July 12th 1895, I must return that paper to the files and cannot leave it with the examiner.

(Counsel for Complainant offers said original will in evidence and as it cannot be filed as evidence in this cause, offers in evidence a certified copy of said will, which is filed by Examiner and marked Exhibit M. C. H. No. 1.)

ALLAN E. WILSON.

Subscribed and Sworn to before me this 21st June 1899.
JNO. E. McNALLY, *Examiner.*

CHARLES EARLY, a witness produced, sworn and examined on behalf of the Complainants deposed as follows:

By Mr. WILLIAMSON:

My name is Charles Early, I reside in this City, I am engaged in the Real Estate business and have for sixteen years in this City, I am familiar with the property described in these proceedings. The house on this property has been built for more than twenty-five years, and is deteriorating in value each year, the foundation is bad, and the house is continually cracking. In the long run if this should be sold for eighty five hundred dollars the income derived from that would be more than that derived from the rental of it, after deducting

loss or rent, taxes, repairs and insurance. If eighty-five hundred dollars should be obtained for this property now it would be a much greater price than could be hereafter obtained for it in my opinion. In my opinion it would be greatly to the benefit and advantage of the infant as well as to the interest of all parties that the property should be sold.

CHARLES EARLY.

32 Subscribed and Sworn to before me this 21st day of June, A. D. 1899.

JNO. E. McNALLY, *Examiner.*

JAMES J. LAMPTON a witness produced, sworn and examined on behalf of the complainant deposed as follows:

By Mr. WILLIAMSON:

My name is James J. Lampton, I reside in this city, I am engaged in the real estate business in this City and have been for seven years. I am familiar with the property described in these proceedings, and know that it is depreciating in value, in my opinion it can be sold now for more than hereafter, that is if it can be sold now for eighty-five hundred dollars, it will be greatly to the advantage of the infant and all concerned for property better situated and newer house and paying better, can be bought for seven thousand dollars. The income from the investment of eighty-five hundred dollars would pay better than holding the property.

JAMES J. LAMPTON.

Subscribed and sworn to before me this 21st day of June, A. D. 1899.

JNO. E. McNALLY, *Examiner.*

MONDAY, *June 26th,* 1899.

Met pursuant to adjournment.

Present Mr. Williamson for complainants and Thomas E. Waggaman, Esq., guardian *ad litem* for Robert E. Hine, and a witness MATTIE McC. HINE a witness produced, sworn and examined on behalf of the complainants deposed as follows:

By Mr. WILLIAMSON:

My name is Mattie McC. Hine, I am the widow of Robert B. Hine, who was a citizen of the United States and a resident of the District of Columbia, and who died therein on June 27th, 1895. My husband left a will dated April 13th, 1895, which was admitted to Probate, he owned among other property sub lot 32 in Square 164 in the City of Washington, improved by a brick dwelling, he left an only child Robert Edward Hine, now ten years of age, my husband's father Henry Hine died February 27th, 1899, his mother Amelia Burnett Hine, was living at the time of the filing of the Bill and resided in Liverpool, England, his sister Amelia Burnett Hine, Junior, lives in the same place, in addition to this sister, he

has two other sisters Elizabeth Howse, and Margaret Leigh. Mrs. Howse lives in South Africa and Mrs. Leigh in Whitney, South Oxon, England. He also left three brothers Frederick Hine, James Hine and Harry Hine, he had another brother William Hine who died in Brooklyn, New York, May 29th 1895, leaving as his children and only heirs at law Robert R. Hine, Harry Hine, William Hine, Frank Hine, Clinton Hine, and Arthur Hine, of these six children last named, as I am informed through the family,
33 the two first named are of full age, and the others are aged respectively thirteen, nine, six, and four years. These are all the persons who would be heirs of my husband or son had my husband died childless and intestate or should my son die. My husband's brother Frederick lives in Liverpool, his brother James in South Africa and his brother Harry in Australia. The house on the lot referred to in the bill was built sometime ago, the building is deteriorating in value each year and the demand for repairs is so constant as to diminish the income to a very large extent, if the property remains as it is, at the termination of the life estate, its value will be inconsiderable in comparison with the sum for which it can now be sold. The interest of all concerned would be promoted by a sale and an investment of the fund, so as that the fund would be always intact. I have recently heard from my husband's relatives in England that his mother is dead.

MATTIE McC. HINE.

Subscribed and Sworn to before me this 26th day of June, A. D. 1899. JNO. E. McNALLY, *Examiner.*

I, John E. McNally, an Examiner in Chancery do hereby certify that the foregoing and annexed depositions were taken down by me from the oral statements of the witnesses, who were each first duly sworn by me to tell the truth, the whole truth, and nothing but the truth touching the matters and things whereof they should be examined. That each witness afterwards subscribed his or her deposition in my presence.

I further certify that I am not of counsel for either party, and that I have no interest in the subject matter of said cause. That my fee for taking said depositions is $10.00 which has been paid.

JNO. E. McNALLY,
Examiner-in-Chancery.

Decree for Sale.

Filed July 6, 1899. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Equity. No. 20225, Docket No. 46.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

This Cause standing ready for hearing on the pleadings and testimony, and being submitted and considered by the Court:

It is, on this 6th day of July in the year of our Lord eighteen hundred and ninety nine (A. D. 1899), adjudged, ordered and decreed by the Court that the decree *pro confesso* heretofore passed
34 in this cause against the defendants therein named be and the same is hereby made absolute, and the court being of opinion that it is expedient to order a sale of the real estate described in these proceedings, doth further adjudge, order and decree that the will of Robert B. Hine, dated April 13, 1895, having been duly proved in this cause is hereby declared to be established; that the real estate in these proceedings described be sold. That Thomas E. Waggaman of the District of Columbia be, and he is hereby, appointed trustee to make said sale; and that the course and manner of his proceedings be as follows: He shall first file with the Clerk of this Court a bond to the United States of America executed by himself with a surety or sureties to be approved by the Court or one of the Justices thereof, in the penalty of eighteen thousand dollars, conditioned for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any future order or decree, in the premises; he shall then proceed to sell said real estate at public or private sale, and if at public auction having first given at least ten days' previous notice by publication inserted in some newspaper published in the District of Columbia, of the time, place, manner and terms of sale, which terms shall be as follows: One third cash, of which a deposit of $200 shall be made at the time of the sale, and the balance, in equal instalments in one and two years, for which the notes of the purchaser, bearing interest, payable semi-annually, from the day of sale, and secured by deed of trust on the property sold, shall be taken, or all cash at the option of the purchaser. All conveyancing, recording and revenue stamps shall be at the cost of the purchaser, and he shall comply with the terms of sale within ten days, from the time of sale, otherwise said property shall be resold at his risk and cost.

And as soon as may be convenient after any such sale or sales, the said trustee shall return to this court a full and particular account of the same, with an affidavit of the truth thereof, and of the fairness of such sale or sales annexed. And on the ratification of such sale or sales by the Court and the payment of the purchase money as aforesaid the said trustee, by good and sufficient deed, to be executed and acknowledged agreeably to law, shall convey to the purchaser or purchasers of said property, and to his, her or their respective heirs and assigns, the property to him, her or them sold, free, clear and discharged of all claim of the parties to this cause, and of any person or persons claiming by, from or under them or any of them. And the said trustee shall bring into this court the money arising on such sale or sales, and the notes, if any, which may be taken for the deferred payments, to be disposed of under the direction of this Court, after deducting therefrom the costs of this suit, and such commission to the said trustee as the Court shall think proper to allow on consideration of the skill, attention and fidelity wherewith he shall appear to have discharged this trust. The title to all said property is hereby devested from the parties to this suit, and vested

in the said trustee for the purposes of making said sale and conveyance.

Said trustee is hereby authorized to pay all taxes and as-
35 sessments against said property, if any, to the day of sale, and shall be allowed credit therefor in his account.

CHAS. C. COLE,
Asso. Justice.

Bond of T. E. Waggaman, Trustee.

Filed July 7, 1899. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

In Equity. No. 20225, Docket 46.

MATTIE MCC. HINE
vs.
ROBERT EDWARD HINE ET AL.

Know all men by these presents, That we, Thomas E. Waggaman, principal, and Daniel B. Clarke, surety all of the District of Columbia, acknowledge ourselves indebted to the United States of America in the penal sum of eighteen thousand dollars, for the payment of which we bind ourselves and every of our heirs, executors, and administrators, jointly and severally, for and in the whole. Sealed with our seals, and dated this 7th day of July, A. D. 1899.

Whereas the said Thomas E. Waggaman has been duly appointed trustee to make sale of the real estate in the proceedings in this cause mentioned.

Now, the condition of the above obligation is such, that if the above-bounden Thomas E. Waggaman shall well and truly discharge the duties devolving upon him as such trustee and shall in all things obey such order and decree as this court shall make in the premises, then the above obligation to be void and of no effect; else to be in full force and virtue.

THOS. E. WAGGAMAN. [SEAL.]
DAN'L B. CLARKE. [SEAL.]

Witness:

W. P. BOTELER.

Approved this 7th day of July, 1899.

CHAS. C. COLE,
Asso. Justice S. C., D. C.

36 *Trustee's Report.*

Filed July 20, 1899. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

Equity. No. 20225.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

The report of Thomas E. Waggaman, trustee appointed by decree in this cause, respectfully represents.

That after giving bond with surety approved by the court, as required by said decree, he has received an offer from Hon. John Hay for the purchase of the property described in the proceedings at and for the sum of $8,500 payable all in cash, and said purchaser is ready and willing to comply with and carry out said offer upon the final ratification of said sale by the court. Your trustee further reports that as shown by the testimony taken in this cause, said offer is most advantageous and is more than could ordinarily be obtained for said property. He has, therefore, accepted said offer and sold property to said purchaser subject to the ratification of such sale by the court. Said sale is in all respects fairly made.

THOS. E. WAGGAMAN.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the report by me subscribed and that the facts therein stated are true as I verily believe.

THOS. E. WAGGAMAN.

Subscribed and sworn to before me this 19th day of July, 1899.

[SEAL.] CHARLES S. DRURY,
Notary Public, D. C.

Order of Ratification Nisi.

Filed July 20, 1899. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

Equity. No. 20225, Doc. 46.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

Upon consideration of the report of Thomas E. Waggaman, Trustee, this day filed, it is this 20th day of July, A. D. 1899,
37 ordered by the court that the sale therein reported be ratified and confirmed, unless cause to the contrary thereof be shown

on or before the 21st day of August, 1899, provided a copy of this order be published in the Washington Law Reporter once a week for three successive weeks before said day.

A. C. BRADLEY, *Justice.*

Filed August 22, 1899. J. R. Young, Clerk.

Supreme Court, District of Columbia, This 10 Day of August, 1899.

Equity. No. 20225, Docket No. 46.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

Affidavit.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me a Notary Public in and for the said District, M. W. Moore, well known to me to be the Manager of "The Washington Law Reporter," a weekly newspaper printed and published in the City of Washington and District aforesaid, and made oath in due form of law that the annexed notice was published in said newspaper once a week for three successive weeks as per certificate in the margin hereto.

Witness my hand and official seal this 10 day of August, 1899.

FRED W. MOORE,
Notary Public, D. C.

[SEAL.]

Copy of Notice.

Filed July 20, 1899. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Equity. No. 20225, Docket 46.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

Upon consideration of the report of Thomas E. Waggaman, trustee, this day filed, it is, this 20th day of July, A. D. 1899, ordered by the Court that the sale therein reported be ratified and confirmed, unless cause to the contrary thereof be shown on or before the 21st day of August, 1899. Provided a copy of this order be pub-
38 lished in The Washington Law Reporter once a week for three successive weeks before said day.

A. C. BRADLEY, *Justice.*

A true copy.
Test:

J. R. YOUNG, *Clerk,*
By M. A. CLANCY, *Ass't Clerk.*

I hereby certify that the foregoing Legal Notice was printed and published in the regular issues of "The Washington Law Reporter," a weekly newspaper, bearing date July 20, 27, August 3, 1899.

M. W. MOORE,
Gen. Manager of The Lew Reporter Co. of Washington City.

No. 20225, Doc. 46.

MATTIE McC. HINE
vs.
ROBERT E. HINE ET AL.

WASHINGTON, D. C., *August*, 10, 1899.

Thos. E. Waggaman to the Law Reporter Company of Washington City, Dr.

Office of Publication, 518 Fifth Street, N. W.

For Publishing the annexed Legal Notice in "The Washington Law Reporter," once a week for three successive weeks. $6.30

Received payment for the Company,
M. W. MOORE,
General Manager,
Per D.

Court Rates for Advertising (Rule 107) 75 Cents per week per Square of four Agate Lines.

Order Finally Ratifying Sale.

Filed August 22, 1899. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

Equity. No. 20225, Doc. 46.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

It appearing to the court that the order passed herein on July 20th, 1899, conditionally ratifying the sale reported by the
39 trustee in this cause, has been duly published as by said order required, and no cause to the contrary having been shown, it is this 22nd day of August, A. D. 1899, ordered by the Court that said sale be and it is finally ratified and confirmed.

HARRY M. CLABAUGH, *Justice.*

Petition of Robert E. Hine by Next Friend.

Filed February 16, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Equity. No. 20225, Doc. 46.

MATTIE McC. HINE, Plaintiff,

vs.

ROBERT EDWARD HINE ET AL., Defendants.

The petition of the above-named Robert Edward Hine, an infant under the age of twenty-one years, by William S. Dixon, of said District of Columbia, his next friend, respectfully shows to the court:

That heretofore, to wit, on the sixth day of July, 1899, by decree of this Court passed in the above entitled cause, Thomas E. Waggaman was duly appointed Trustee to make sale of the real estate described in the proceedings in said cause.

That he, the said Thomas E. Waggaman, duly qualified as such trustee and in his capacity as such trustee he made such sale at and for the sum of eighty five hundred dollars ($8500.00) cash, as more fully appears by said trustee's report of sale filed in said cause on the 20th day of July, 1899. That the said sale was duly and finally ratified by said Court on the 22d day of August, 1899. That, as this petitioner is informed and believes, the said Thomas E. Waggaman, in his said capacity as such trustee received the said sum of $8500, being the purchase price above mentioned. That the said Thomas E. Waggaman has not filed any account in said cause, or elsewhere, of his trusteeship above mentioned.

That since his receipt of said sum, to wit, on the 26th day of September, 1904, the said Thomas E. Waggaman has been duly adjudged a bankrupt, and it is important to the interests of the said Robert Edward Hine that the said Thomas E. Waggaman should state his account as trustee in this cause, and discover how and in what manner he has disposed of the said sum of $8500.00 and, if necessary, bring into court the said sum for its proper preservation in accordance with the further order of the Court.

Wherefore your petitioner prays that a rule may be issued by this honorable court requiring the said Thomas E. Waggaman to show cause why he should not account for all moneys received by him in his said capacity as such trustee and to produce the said moneys, or the securities representing the same, to be deposited in the registry of the Court, or otherwise to be accounted for as the
40 court may order, and your petitioner prays for such other and further relief as the nature of the case may require.

ROBERT EDWARD HINE,
By WM. S. DIXON,
His Next Friend.

WM. M. LEWIN,
Attorney for the Petitioner.

DISTRICT OF COLUMBIA, *to wit:*

I do solemnly swear that I have read the foregoing and annexed petition by me subscribed with the name of Robert Edward Hine, as his next friend, and know the contents of said petition and that the statements therein made of my own knowledge are true and those made upon information and belief I believe to be true.

WM. S. DIXON.

Subscribed and sworn to before me in said District, this 14th day of February, 1905, witness my hand and official seal.

[SEAL.] HENRY JAY WYLIE,
Notary Public.

Order Upon Thos. E. Waggaman to Show Cause.

Filed Feb. 16, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Equity. No. 20225.

MATTIE McC. HINE, Plaintiff,
vs.
ROBERT EDWARD HINE ET AL., Defendants.

Upon consideration of the petition of Robert Edward Hine, by Wm. S. Dixon, his next friend, it is by the Court this 16th day of February, 1905, Ordered that Thomas E. Waggaman, trustee by appointment by decree of this Court, passed in this cause on 6th day of July, 1899, do within 10 days from the day of the service of a copy of this order upon said Thomas E. Waggaman, answer the said petition, making discovery of the amount of funds received by him under and by virtue of his said appointment, and the disposition he has made of the same, and show cause, if any he has, why the said funds, or the securities representing the same, should not be deposited in the registry of this Court, there to await the further order of the Court.

THOS. H. ANDERSON, *Justice.*

41 *Marshal's Return.*

Served copy of the order on Thomas E. Waggaman, personally. May 5, 1905.

AULICK PALMER, *Marshal.*
S.

Answer of Thomas E. Waggaman.

Filed May 15, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Equity. No. 20225.

MATTIE McC. HINE
vs.
ROBERT EDWARD HINE ET AL.

The answer of Thomas E. Waggaman to the petition of Robert Edward Hine, by next friend, and the rule to show cause issued thereon.

Respondent admits that he was duly appointed trustee by the decree passed herein on July 6, 1899, and qualified by giving the bond as required by said decree.

Thereafter sale was made of the property referred to in these proceedings at and for the sum of $8,500 cash, which sale was finally ratified in this cause on August 22, 1899, and said purchase money was received by respondent.

Out of said purchase money respondent paid a commission of three per cent. to Charles Early who found the purchaser, respondent making no charge himself, and the costs of this suit, including a counsel fee of $25. Under the terms of the will referred to in these proceedings Mrs. Mattie McC. Hine had a life estate in the property so sold, and after such sale she had a right to the income from the net proceeds of sale for life. Respondent made up and delivered to Mrs. Hine an account, a copy of which is annexed as a part of this answer, showing a balance of $8147.72 in his hands, which balance was true and accurate, and it was then and there on the day of the date of said account agreed by and between respondent and said Mrs. Hine that respondent should hold said balance and pay her interest thereon at the rate of five per cent. per annum, payable quarterly. This interest was paid regularly up to May 1st or August 1" 1904.

At the time of said arrangement it was the intention of respondent, as communicated to Mrs. Hine, to invest said balance as a loan on a house and lot on Hillyer Place, Washington, D. C., should the then loan thereon be called in, said loan being held by the Jessup
42 estate, but said loan was not called in and said balance remained in respondent's hands under the arrangement aforesaid with respect to the payment of interest to Mrs. Hine, and was in his hands at the time he was adjudged a bankrupt.

And respondent further says that at the time of the arrangement with Mrs. Hine as aforesaid he was, as he believed in absolute good faith, entirely solvent, and so remained as he believed until the filing of the petition in bankruptcy against him. By reason of said bankruptcy proceeding and his adjudication as a bankrupt it is absolutely impossible for respondent to raise the amount of said balance and pay the same into court, and his inability in this respect

is not caused by any unwillingness on his part to do so, or to comply with any order of this court, but solely because he is unable so to do.

And having fully answered, he prays that said rule may be discharged.

THOS. E. WAGGAMAN.

Subscribed and sworn to before me this — day of May, 1905.
[NOTARIAL SEAL.] CLARKE WAGGAMAN,
Notary Public.

Filed May 15, 1905. J. R. Young, Clerk.

WASHINGTON, D. C., *Aug.* 31, 1899.

Thomas E. Waggaman, Real Estate Broker and Auctioneer, No. 917 F Street N. W.

In Account with Thos. E. Waggaman, Trustee. Equity. No. 20225. Hines *vs.* Hines.

N. B.—Please report any errors which may occur in your account as soon as discovered.

Proceeds of sale of Sub lot 32 Square 164 sold to Hon. John Hay	$8500	
Costs of publication against absent heirs		11 25
" " " of order ratifying sale		6 30
Deposit with Clerk of Court		10
" " Marshal		1
Examiner's fee		10
Witness "		1 25
Allowed purchaser pro rata taxes from June 30th to August 22d 1899		9 23
Costs of affidavit		25
Additional costs		23
Williamson's fee		25
Trustee's Commissions 3 % paid to Mr. Chas. Early		225
Balance for investment		8147 72
	8500	8500 —

43 *Motion of Robert E. Hine to Require Trustee to Pay Money into Court.*

Filed November 14, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

In Equity. No. 20225.

MATTIE MCC. HINE, Complainant,
vs.
ROBERT E. HINE ET AL.

Now again comes Robert E. Hine, one of the defendants in the above-entitled cause, by William S. Dixon, his next friend, and

moves that the Court, upon consideration of the answer heretofore filed herein by Thomas E. Waggaman in response to the rule laid upon the said Thomas E. Waggaman, require the said Thomas E. Waggaman to pay into the registry of the Court the sum of $8147.72, which the said Thomas E. Waggaman, in the said answer, acknowledges to be the balance due from him as trustee appointed by the Court in this cause to sell the property described in the bill filed herein.

C. A. KEIGWIN,
W. H. ROBESON,
Solicitors for Robert E. Hine.

Mr. Thomas E. Waggaman:

Please take notice that we shall ask the action of the Court upon the foregoing motion on next Friday, the 17th day of November, 1905, at ten o'clock A. M., on that date, or as soon thereafter as counsel can be heard.

W. H. ROBESON.
C. A. KEIGWIN.

Service acknowledged, Nov. 14, 1905.

I. WILLIAMSON,
For T. E. WAGGAMAN.

44 *Motion of Mattie McC. Hine to Require Thos. E. Waggaman, Trustee, to Pay Money into Court.*

Filed Nov. 14, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

In Equity. No. 20225.

MATTIE McC. HINE, Complainant,
vs.
ROBERT E. HINE ET AL.

Now comes Mattie McC. Hine, the complainant in the above entitled cause, and moves — the Court upon consideration of the answer heretofore filed herein by Thomas E. Waggaman in response to the rule laid upon the said Thomas E. Waggaman, require the said Thomas E. Waggaman to pay to the registry of the Court the sum of $8147.72, which the said Thomas E. Waggaman, in the said answer, acknowledges to be the balance due from him as trustee appointed by the Court in this cause to sell the property described in the bill filed herein.

W. H. ROBESON,
CHARLES A. KEIGWIN,
Solicitors for Mattie McC. Hine.

Mr. Thomas E. Waggaman:

Please take notice that we shall ask the action of the Court upon the foregoing motion on next Friday, the 17th day of November, 1905, at ten o'clock A. M., on that date, or as soon thereafter as counsel can be heard.

W. H. ROBESON.
C. A. KEIGWIN.

Service acknowledged Nov. 14, 1905.

I. WILLIAMSON,
For T. E. WAGGAMAN.

Order on Trustee to Pay Money into Court.

Filed November 21, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

In Equity. No. 20225, Doc. 46.

MATTIE McC. HINE
vs.
ROBERT E. HINE ET AL.

This cause coming on again to be heard upon the motions heretofore filed by the complainant Mattie McC. Hine and the de-
45 fendant Robert E. Hine by his next friend, for an order requiring Thomas E. Waggaman, trustee appointed herein by this court, to pay into court the sum of $8147.72, reported by the said trustee to be due from him, upon consideration of the said motions and of the answer made by the said trustee to the rule heretofore laid upon him to show cause why he should not pay the said sum, it is this 21st day of November, 1905, adjudged, ordered and decreed that the said Thomas E. Waggaman pay into the registry of this court the said sum of $8147.72 with legal interest thereon from the 1st day of August, 1904, within ten days from service of a copy of this order upon the solicitor of the said Thomas E. Waggaman.

WENDELL P. STAFFORD, *Justice.*

Motion for Judgment.

Filed April 9, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48380.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE ET AL., Plaintiff,
vs.
THOMAS E. WAGGAMAN and DANIEL B. CLARKE.

Now comes the plaintiff in the above entitled cause and moves the Court to enter judgment therein against the defendant Daniel B.

Clarke for the amount claimed in the declaration because of the want of a sufficient affidavit of defense filed with the plea of the said defendant.

WM. H. ROBESON,
C. A. KEIGWIN,
Attorneys for Plaintiff.

Mr. John Selden, Attorney for Daniel B. Clarke:

Please take notice that we shall ask the action of the Court upon the foregoing motion on Friday the 13th day of April, 1906, upon the coming in of the Court on that day or as soon thereafter as counsel can be heard.

WM. H. ROBESON,
C. A. KEIGWIN,
Attorneys for Plaintiff.

Service acknowledged April 4th, 1906.

JOHN SELDEN,
Att'y for D'f't Clarke.

46 Supreme Court of the District of Columbia.

MONDAY, *May 28th,* 1906.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * * * *

No. 48380. At Law.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE, Plaintiff,

vs.

THOMAS E. WAGGAMAN and DANIEL B. CLARKE, Defendant-.

Upon consideration of the motion filed herein for judgment against the defendant Daniel B. Clarke, for want of a sufficient affidavit of defense, it is ordered that said motion be and is hereby granted. Thereupon, it is considered and adjudged, that the plaintiffs herein recover of the defendant Daniel B. Clarke the sum of Eighteen Thousand Dollars ($18,000.00) the penalty of the bond sued on herein; said bond to be released upon payment by said defendant to the plaintiffs herein, of the sum of Eight Thousand One Hundred and Forty-seven Dollars and seventy-two cents ($8147.72) with interest thereon from the first day of August, 1904, together with costs of suit to be taxed by the Clerk and have execution thereof.

From the aforegoing the defendant Daniel B. Clarke by his attorney, John Selden, Esq., in open court notes an appeal to the Court of Appeals, and thereupon the amount of the bond on such appeal, to operate as a supersedeas is hereby fixed in the sum of Eighteen Thousand Dollars, with surety or sureties to be approved by this Court.

Opinion.

Filed May 28, 1906.

At Law. No. 48380.

UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE

versus

THOMAS E. WAGGAMAN and DANIEL B. CLARK.

The declaration in this case is laid in covenant, and is brought by the United States of America to the use of Mattie McC. Hine and her son, Robert E. Hine, against Thomas E. Waggaman as principal and Daniel B. Clarke as surety on a bond executed by them in Equity Cause No. 20,225 before this Court and reciting that they were indebted to the United States of America in the sum of $18,000 and would remain so indebted until discharged by the faith-
47 ful performance of a certain trust reposed in Waggaman to sell certain real estate involved in said equity cause and pay the proceeds thereof into the registry of the Court. The declaration sets up that proceeds of said sale to the amount of $8,147.72 came into the hands of said Waggaman, but that he has not paid the same into the registry of the Court, or into the hands of any officer of the Court, or to any person authorized by the Court to receive the same. The declaration further sets up the entering of an order in said equity cause requiring said Waggaman to pay over said fund, but that he has failed to do so; and also that the surety Clarke has failed, upon request made to him, to pay said fund. The suit is brought to the use of Mattie McC. Hine and Robert E. Hine as parties who were entitled to share in the proceeds of sale sought to be recovered.

The declaration is supported by an affidavit of merit.

No service of process has been had upon the defendant Waggaman; but the defendant Clarke has been served, and he has filed pleas and an affidavit of defense setting up that the suit in equity in which the bond was given was illegal, for the reason that the real estate attempted to be sold had been devised by one Robert B. Hine (under whom the use plaintiffs here claim) upon certain conditions, namely, that Mattie McC. Hine, his wife, should take a life estate, charged with insurance and repairs, and, after her death, the real estate to go to their son, Robert Edward Hine, with certain limitations over in favor of third persons in case of the marriage of Mattie McC. Hine after the death of Robert Edward Hine,—the contention of the defendant being that a court of equity has no power to decree a sale of real estate left under such conditions.

The affidavit of defense also sets up that Mattie McC. Hine, subsequently to the time when the proceeds of sale came into the hands of Waggaman, agreed with him that he should retain and invest the same, paying her 5% interest,—the contention being that such arrangement operated to release the defendant Clarke as surety.

The plaintiff has filed a motion for judgment under the 73rd

rule, contending that neither of the defenses set up in the affidavit of defense is sufficient.

The motion for judgment in this case must be sustained for want of a sufficient affidavit of defense under the 73rd rule.

As to the defense that Mattie McC. Hine, subsequent to the time when the proceeds of sale came into the hands of Waggaman, agreed with him that he should retain and invest the same paying her 5% interest, and that such agreement operated to release the defendant Clarke as surety on the bond sued upon, it is sufficient to say that this so-called agreement or arrangement is wholly lacking in the essential elements of a contract which would be of any binding force in this connection—

First. Because such agreement or arrangement was neither for a definite time nor based upon a valid consideration.

Second. Because such agreement or arrangement was not entered into between the parties to the bond, to-wit, the obligor Waggaman and the obligee, the United States of America, the real plaintiff in this action but between the obligor Waggaman and a third
48 party, to-wit, Mattie McC. Hine, one of the use plaintiffs herein. See Karrick *v.* Wetmore, 31 W. L. R. 714, Nov. 4, 1903. It may also be added that, even if the agreement or arrangement had been between the parties to the bond for a definite time and for a definite consideration, such agreement or arrangement would still have been invalid, and therefore insufficient to operate as a release of the surety Clarke, providing that the Court had jurisdiction to enter its decree of 1899, or that the defendants are estopped to deny such jurisdiction, because such agreement would be a violation of the decree itself and inoperative for any purpose.

Nor can the next ground of defense urged by the defendant Clarke be sustained, namely, that the equity court had no jurisdiction to decree the sale of the fee-simple title to the real estate, and that therefore the whole proceedings were void.

In the first place, bearing in mind that the present suit is being prosecuted by the United States of America, the obligee of the bond, against the obligor, Waggaman, and the surety thereon, Clarke, to recover funds received by the obligor, Waggaman, under the decree of the equity court passed in 1899, it is quite clear that they are estopped from denying the jurisdiction of the court to pass the decree, no matter whether such decree is valid or invalid. If the decree is valid, the United States is entitled to enforce the bond for the recovery of the money, in order that the same may be paid over to the parties to the cause in the proper proportions; and, if invalid, the United States has equal right to sue upon this bond for the recovery of the money, in order that it may make a proper refund to the purchaser at the sale, and thereby remedy the mistake. Moreover, the defendant Clarke is conclusively presumed to have understood the terms of the bond at the time he signed and sealed it, and one of the express covenants of the bond reads as follows:

"SAID THOMAS E. WAGGAMAN HAS BEEN DULY APPOINTED TRUSTEE TO MAKE SALE OF THE REAL ESTATE IN THE PROCEEDINGS IN THIS CAUSE MENTIONED."

In making such sale, Waggaman was acting under the terms of this covenant, and, having received the proceeds of the sale pursuant to the decree, he is now estopped, and his surety is likewise estopped, from denying the jurisdiction of the Court to enter the decree.

In the second place, even granting that the Court was without jurisdiction to decree the sale of the fee-simple title to this real estate, it had undoubted power to decree the sale of the life estate of Mrs. Mattie McC. Hine, the complainant in that suit, and therefore it had jurisdiction of the cause to that extent at least, and hence it cannot be said to have been wholly without jurisdiction. In the case of Trust Co. *v.* Muse, 4 App. D. C. 12, cited in the course of the argument, the purchaser at the sale took a direct appeal from an order of the court confirming such sale, on the ground that the court could not convey him a complete title, for the reason that it had no power to convey the interest in remainder, and therefore was without authority to pass a perfect title to the real estate; and the Court of Appeals sustained the contention of the purchaser and reversed the Court below. In the case at bar, however, the objection that
49 the Court was without power to pass a perfect title is not one raised by a bidder, but is collaterally raised by the surety on the bond, and, since the Court, as already stated, was not altogether without jurisdiction over the real estate, and hence its decree was not an absolute nullity, the surety, even were he not otherwise estopped, could not defend here by alleging a mere error of the Court in exceeding or unduly extending the scope of its authority.

And finally, even if the Court had been altogether without jurisdiction over the real estate, the bond sued upon is a valid common law obligation, and enforceable as such.

THOS. H. ANDERSON, *Justice.*

Supreme Court of the District of Columbia.

MONDAY, *June 11th,* 1906.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice, presiding.

No. 48380. At Law.

THE UNITED STATES OF AMERICA to the Use of HINE ET AL., Pl'ffs,
vs.
THOMAS E. WAGGAMAN and DANIEL B. CLARKE, Defendants.

Comes now Mr. John Selden, attorney, and in open Court suggests the death of the defendant Daniel B. Clarke, and moves that the executors of said deceased be made parties defendant. Whereupon, it appearing that Alexander Porter Morse, the Union Trust Company of the District of Columbia and Daniel Boone Clarke Waggaman, have duly qualified as Executors of said decedent, which is not denied, it is ordered hereby that said executors be, and hereby are made parties defendant in the place and stead of said decedent.

Order for Appearance.

Filed June 11, 1906.

In the Supreme Court of the District of Columbia, the 11th Day of June, 1906.

At Law. No. 48380.

UNITED STATES OF AMERICA Use of ——
vs.
THOMAS E. WAGGAMAN ET AL.

The Clerk of said Court will please enter my appearance for Alexander Porter Morse, The Union Trust Company, of the District of Columbia, and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, deceased.

JOHN SELDEN.

50 *Memorandum.*

June 14, 1906.—Appeal Bond filed.

51 *Mandate.*

Filed May 25, 1907. J. R. Young, Clerk.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas, lately in the Supreme Court of the District of Columbia, before you, or some of you, in a cause between The United States of America to the use of Mattie McC. Hine and Robert E. Hine, plaintiffs and Thomas E. Waggaman and Daniel B. Clarke defendants, Law No. 48380, wherein the judgment of the said Supreme Court entered in said cause on the 28th day of May, A. D. 1906, is in the following words, viz:

Upon consideration of the motion filed herein for judgment against the defendant Daniel B. Clarke, for want of a sufficient affidavit of defense, it is ordered that said motion be and is hereby granted. Thereupon, it is considered and adjudged, that the plaintiffs herein recover of the defendant Daniel B. Clarke the sum of Eighteen Thousand Dollars ($18,000.00) the penalty of the bond sued on herein; said bond to be released upon payment by said defendant to the plaintiffs herein, of the sum of Eight Thousand One Hundred and Forty-seven Dollars and seventy-two cents ($8147.72) with interest thereon from the first day of August, 1904, together with costs of suit to be taxed by the Clerk and have execution thereof.

From the aforegoing the defendant Daniel B. Clarke by his attorney, John Selden, Esq., in open court notes an appeal to
52 the Court of Appeals, and thereupon the amount of the bond on such appeal, to operate as a supersedeas is hereby fixed in the sum of Eighteen Thousand Dollars, with surety or sureties to be approved by this Court.

And whereas, to wit: on the 11th day of June A. D. 1906, of the said Supreme Court the following appears of record:

Comes now Mr. John Selden, attorney, and in open Court suggests the death of the defendant Daniel B. Clarke, and moves that the executors of said deceased be made parties defendant. Whereupon, it appearing that Alexander Porter Morse, the Union Trust Company of the District of Columbia and Daniel Boone Clarke Waggaman, have duly qualified as Executors of said decedent, which is not denied, it is ordered hereby that said executors be, and hereby are made parties defendant in the place and stead of said decedent.

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, taken by Alexander Porter Morse, The Union Trust Company of the District of Columbia, and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, deceased, whereon The United States of America to the use of Mattie McC. Hine and Robert E. Hine were made the parties appellees agreeably to the Act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of April, in the year of our Lord one thousand nine hundred and seven, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court
53 in this cause be, and the same is hereby, reversed with costs; and that the said Alexander Porter Morse *et al.* recover against the said plaintiffs Seventy dollars and twenty-five cents for their costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

MAY 7, 1907.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 25th day of May in the year of our Lord one thousand nine hundred and seven.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Costs of Alexander Porter Morse et al.

Clerk	$10.50
Attorney	5.00
Printing Record	54.75
	$70.25
	24.65
	$94.90

54 *Demurrer to Pleas.*

Filed November 8, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48380.

THE UNITED STATES to the Use of MATTIE McC. HINE ET AL., Plaintiffs,
vs.
ALEXANDER P. MORSE ET AL., Executors, &c., Defendants.

Now comes the plaintiff in the above entitled cause and says that the pleas herein filed by the defendant- are, each and all, bad in substance.

WILLIAM H. ROBESON,
CHARLES A. KEIGWIN,
WM. HEPBURN RUSSELL,
Attorneys for Plaintiff.

NOTE.—Among the matters of law intended to be argued in support of the above demurrer are the following:

1. That there is nothing in the said pleas, or in either of them, which goes to invalidate or impair the bond sued upon or to discharge or relieve the obligation of the parties thereto, or of either of them.

2. That, notwithstanding the averments of the said pleas, taking the same to be true, the court had power to accept the bond sued upon and to require the trustee and his surety to pay into court the proceeds of the sale secured thereby.

55 3. That the alleged arrangement between Mattie McC. Hine and Thomas E. Waggaman, was without bearing or effect upon the obligations of the bond sued upon.

4. That each and all of the matters alleged and set up in and by the said pleas, or either of them, is, and are, immaterial and irrelevant to the averments of the declaration, and is and are insufficient to constitute any ground of defense against the right of action set forth in the declaration.

Joinder in Demurrer.

Filed November 8, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48380.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE,
vs.
THOMAS E. WAGGAMAN ET ALS.

The defendants Alexander Porter Morse, The Union Trust Company of the District of Columbia, and Daniel Boone Clarke Waggaman, sole Executors of the Last Will and Testament of Daniel B. Clarke, deceased, say,

That the respective pleas herein pleaded by their Testator, in his lifetime, are severally good in substance.

____ ____,
Attorney for the said Defendants.

56 Supreme Court of the District of Columbia.

FRIDAY, *November 8th,* 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

No. 48380. At Law.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE. Plaintiff,
vs.
ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased, Def'ts.

Come now the defendants herein by their Attorney Mr. John Selden, and presents to the Court the Mandate of the Court of Appeals filed herein May 25th 1907, whereupon, it appearing by said mandate that the judgment of this court is reversed with costs, it is adjudged and ordered that the judgment entered herein on the 28th day of May 1906, be, and is hereby set aside, vacated and for nothing held. Further that the defendants herein recover against the plaintiffs herein the sum of Ninety-four Dollars and ninety cents ($94.90) for their costs of appeal, and have execution thereof.

It is further ordered that the motion filed herein for judgment against the defendants for want of a sufficient affidavit of defense, be,

and is hereby, overruled, to which the plaintiffs by their attor-
57 ney note an exception.

Thereupon, upon consideration of the demurrer herein to defendants' pleas and joinder in demurrer thereto, filed this 8th day of November, 1907, it is ordered that said demurrer be, and is hereby, overruled, with leave to plaintiffs to plead over as they may be advised. and thereupon, plaintiffs by their attorney Mr. Charles A. Keigwin, in open court, elect to stand upon said demurrer; whereupon, it is considered and adjudged that the plaintiffs take nothing by this action, that the defendant- go hereof without day be for nothing held, and recover of plaintiffs herein their costs of suit to be taxed by the Clerk, and have execution thereof.

Thereupon, the plaintiffs by their attorneys in open Court, note an appeal to the Court of Appeals, and bond for costs on said appeal is thereupon fixed at Fifty ($50.00) Dollars.

Motion to Vacate Judgment.

Filed November 13, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48380.

THE UNITED STATES to the Use of MATTIE McC. HINE ET AL., Plaintiff,
vs.
ALEXANDER P. MORSE ET AL., Executors, &c.

Now comes the plaintiff in the above entitled cause and moves the Court to vacate and set aside the judgment herein ren-
58 dered on the 8th day of November, 1907, and to permit the plaintiff to plead to the pleas filed herein by the defendants.

WM. H. ROBESON,
CHAS. A. KEIGWIN,
Attorneys for Plaintiff.

Mr. John Selden, Attorney for Defendants:

Please take notice that we shall ask the action of the court upon the foregoing motion in Circuit Court No. 2, before Mr. Justice Anderson, on next Friday, the 15th day of November, 1907, upon the coming in of the court on that day, or as soon thereafter as counsel can be heard.

WM. H. ROBESON.
CHAS. A. KEIGWIN.

Service acknowledged November 12/1907.
JOHN SELDEN.

Supreme Court of the District of Columbia.

MONDAY, *November 25th*, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice Presiding.

No. 48380. At Law.

U. S. *ex Rel.* MATTIE McC. HINE and ROBERT E. HINE, Plaintiffs,
vs.
ALEXANDER P. MORSE ET AL., Def'ts.

59 Come now the plaintiffs by their attorney Mr. Robeson and in open court withdraw the appeal noted by them on the eighth instant from the judgment entered herein on said date. Thereupon, upon consideration of the motion filed herein by the plaintiffs to vacate said judgment, it is ordered that said motion be and is hereby set aside, vacated and for nothing held with leave to said plaintiffs to plead within ten days to the pleas of the defendant- filed herein.

Replication.

Filed December 6, 1907.

In the Supreme Court of the District of Columbia.

No. 48380. At Law.

THE UNITED STATES OF AMERICA to the Use of MATTIE McCABE HINE and ROBERT E. HINE, Plaintiff,
vs.
ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased, Defendants.

60 1. Now comes the plaintiff in the above entitled cause, and, for replication to so much of the first of the pleas herein by the defendant Daniel B. Clarke pleaded as alleges that, after the sale of the property mentioned in the said plea, and also in the said plaintiff's declaration herein filed, had been made, as is in the said plea and in the said declaration stated, and after the receipt by the defendant Thomas E. Waggaman of the proceeds of the said sale, so also in the said plea and in the said declaration stated, the said Mattie McC. Hine, mentioned in the said plea, entered into an agreement with the said Thomas E. Waggaman, such as is in the said plea alleged and set forth, whereby the said Waggaman was to continue to retain in his hands the said proceeds of the said sale, without returning or reporting the same into or unto the Supreme Court of the District of Columbia, and whereby the

said Waggaman was to pay to the said Mattie McC. Hine interest upon the said proceeds, in the manner and upon the terms in the said plea alleged and stated,

And as to so much of the said plea as alleges or supposes that the said arrangement was made, or in any part or in any manner performed or carried into effect,

And as to so much of the said plea as alleges or supposes that the said Waggaman retained the said proceeds of the said sale under or in virtue of, or in pursuance of, such arrangement, or by, or with, or in virtue of the consent of the said Mattie McC. Hine to such arrangement,

The said plaintiff joins issue upon so much of the said plea.

2. And as to so much of the second of the pleas by the said defendant- herein pleaded as alleges or supposes that the said
60½ defendant Thomas E. Waggaman retained the proceeds of the sale of the said property, which is in the said plea mentioned and stated to have been sold, under, or in virtue of, or in pursuance of, any such arrangement with the said Mattie McC. Hine, in the said plea mentioned, as is in the said plea supposed and, by reference to the former plea of the said defendant Clarke indicated, or that the said defendant Waggaman retained the said proceeds by, or with, or in virtue of, the consent of the said Mattie McC. Hine to such arrangement, the said plaintiff joins issue upon so much of the said plea.

Demurrer.

And as to the residue of the said pleas by the said defendant Clarke herein pleaded, and as to the residue of each and both of the said pleas, the said plaintiff says that the said pleas, and each and both of them, are bad in substance.

CHAS. A. KEIGWIN,
WM. H. ROBESON,
WM. H. RUSSELL,
Attorneys for Plaintiff.

NOTE.—Among the matters of law intended to be argued in support of the foregoing demurrer are these:

1. That there is nothing in the said pleas, or in either of them, which goes to invalidate or impair the bond sued upon or to
61 discharge or relieve the obligation of the parties thereto, or of either of them.

2. That, notwithstanding the averments of the said pleas, taking the same to be true, the court had power to accept the bond sued upon and to require the trustee and his surety to pay into court the proceeds of the sale secured thereby.

3. That each and all of the matters alleged and set up in and by the said pleas, or either of them, is, and are, immaterial and irrelevant to the averments of the declaration, and is and are insufficient to constitute any ground of defense against the right of action set forth in the declaration.

I hereby acknowledge the service of a copy of this pleading.

——— ———,
Attorney for Defendants.

62 *Joinder in Demurrers.*

Filed December 10, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48380.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE, Plaintiff,

vs.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of the Last Will and Testament of Daniel B. Clarke, Deceased, Defendants.

The said defendants say:

I. That the plea hereinbefore by the said Daniel B. Clarke, in his lifetime, pleaded unto, *the First Breach in the Declaration assigned,* as to any supposed interest, benefit or behoof of the said Robert E. Hine, one of the Usees of this action, and the like plea unto the same breach, hereinbefore by the said Daniel B. Clarke, in his lifetime, pleaded as to any supposed interest, benefit or behoof of the said Mattie McC. Hine, the other of the Usees of this action, are severally, good in substance.

II. That the plea by the said Daniel B. Clarke, in his lifetime, pleaded unto the *Second Breach in the Declaration assigned,* as to any supposed interest, benefit or behoof of the said Robert E.
63 Hine, one of the Usees of this action, and the like plea unto the same breach, hereinbefore by the said Daniel B. Clarke, in his lifetime, pleaded as to any supposed interest, benefit or behoof of the said Mattie McC. Hine, the other of the Usees of this action, are, severally, good in substance.

JOHN SELDEN,
Attorney for Defendants.

Supreme Court of the District of Columbia.

TUESDAY, *February 25th*, 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

No. 48380. At Law.

THE UNITED STATES OF AMERICA to the Use of MATTIE MCCABE HINE and ROBERT E. HINE, Plaintiff,

vs.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased, Defendants.

Upon consideration of the demurrer filed herein December 6th 1907, to the pleas of defendant Daniel B. Clarke, it is ordered that said demurrer be, and the same is hereby overruled, whereupon the plaintiffs by their attorneys in open court, elect to stand upon
64 said demurrer; thereupon, it is considered and adjudged that the plaintiffs herein take nothing by this action, that the defendants go hereof without day, be for nothing held, and recover of plaintiffs their costs of defense to be taxed by the Clerk, and have execution thereof.

From the aforegoing the plaintiffs by their attorneys note an appeal, in open court, to the Court of Appeals of the District of Columbia, whereupon the penalty of an appeal bond for costs herein, is hereby fixed in the sum of One Hundred Dollars, with leave to deposit the sum of Fifty Dollars in lieu of such a bond, in the Registry of this Court.

Memorandum.

March 13, 1908.—$50 deposited in lieu of appeal bond.

Directions to Clerk for Preparation of Transcript of Record.

Filed March 13, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 48380.

THE UNITED STATES OF AMERICA to the Use of MATTIE MCC. HINE ET AL., Plaintiffs,

vs.

ALEXANDER P. MORSE ET AL., Executors, &c.

The Clerk will please prepare a transcript of the record in
65 the afore-entitled case for use on appeal and include therein:

1. The Declaration and Affidavit of Merits, filed March 5, 1906.

2. Memorandum of the issue and return of process, March 5, 1906.

3. The Pleas and Affidavit of Defence, filed March 27, 1906, with exhibits attached thereto.

4. The motion for judgment, filed April 9, 1906.
5. The judgment entered on May 28, 1906.
6. The opinion of Mr. Justice Anderson, filed May 28, 1906.
7. The suggestion of Death and Order substituting Executors, entered on June 11, 1906.
8. Entry of Appearance, June 11, 1906.
9. Memorandum of Appeal Bond filed June 14, 1906.
10. The Mandate of the Court of Appeals, filed May 25, 1907.
11. Demurrer and joinder filed November 8, 1907; order overruling demurrer, with costs and giving leave to amend; judgment on demurrer with costs, and order allowing appeal on making deposit of $50.
12. Motion to vacate judgment of November 18, 1907, and for leave to plea, filed November 12, 1907, and order granting motion.
13. The Replication and Demurrer of the Plaintiff, filed December 6, 1907.
14. Joinder in Demurrer, filed December 10, 1907.
15. The judgment entered on February 25, 1908.

66 16. Memorandum of Appeal Bond filed.
17. This Designation.

WM. H. ROBESON,
CHAS. A. KEIGWIN,
Attorneys for Plaintiff, Appellant.

Service by copy of the foregoing designation is accepted this 12th day of March, 1908.

JOHN SELDEN,
Attorney for Defendant-.

67 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 66, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48380, at Law, wherein The United States of America, to the use of Mattie McC. Hine and Robert E. Hine is plaintiff, and Alexander Porter Morse *et al.* are defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 23rd day of April, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1899. The United States of America to the use of Mattie McC. Hine and Robert E. Hine, appellant, *vs.* Alexander Porter Morse, The Union Trust Company of the District of Columbia, and Daniel Boone Clarke Waggaman, executors of Daniel B. Clarke, deceased. Court of Appeals, District of Columbia. Filed Apr. 24, 1908. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia, —— Term, 1908.

No. 1899.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE, Appellants,

vs.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased.

And now comes the appellant and in view of the decision rendered by this court, in the above entitled cause, at its April term, 1907, consents that the judgment involved upon the present appeal, may be affirmed, pro forma, with costs, with a view of presently suing out a writ of error from the Supreme Court of the United States, to review the judgment so affirmed.

WILLIAM H. ROBESON,
Attorney for Appellants.

(Endorsed:) Court of Appeals D. C. No. 1899. U. S. of A. to use of Mattie McC. Hine, et al., Appellants, vs. Alexander Porter Morse, et al. Appellants consent that judgment be affirmed with costs. Court of Appeals, District of Columbia. Filed May 19, 1908. Henry W. Hodges, Clerk.

TUESDAY, *May 19th, A. D.* 1908.

No. 1899.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE, Appellants,

vs.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased.

The motion to affirm the judgment in the above entitled cause was submitted to the consideration of the Court by Mr. C. A. Keigwin, of counsel for the appellants, in support of motion.

No. 1899.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE, Appellants,

vs.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

This is a second appeal in this case, the judgment in which, on the former appeal, was reversed, and the cause remanded with direc-

tion to take further proceedings not inconsistent with the opinion then delivered. Morse vs. U. S. use of Hine, 29 App. D. C. 433. It appearing that the case was retired in accordance with the mandate of this Court, and that the questions raised are the same decided on the former appeal, the judgment, for the reasons given in said opinion, is affirmed with costs.

Affirmed.

No. 1704.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased, Appellants,

vs.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE.

Opinion.

Mr. Justice McCOMAS delivered the opinion of the Court:

This is an appeal from a judgment under the Seventy-third Rule of the court below rendered in an action of debt, upon the bond of a trustee for sale, appointed by decree in equity, against the surety in the bond for $18,000, the penalty to be released upon payment of $8,147.72, with interest and costs. The appellants are the executors of the surety, and say the court below erred in the rendition of such judgment because the contentions raised by the pleadings and affidavit of defense presented a case of complete defense or at least such a case as did not entitle the plaintiff below to this summary judgment.

The questions raised are interesting and important and can be better understood by referring to the fact alleged in the pleas and supporting affidavit and the proceedings out of which arose the suit against the deceased surety and the judgment appealed from.

Robert E. Hine died in 1895 seized in fee of real estate yielding rent and including lot 32 in square 164 in Washington, known as 1712 L street northwest, improved by a dwelling, and had by his will devised all of his realty to his widow, Mattie McC. Hine, for life (charging the life estate with the cost of insurance and repairs), with vested remainder in fee to Robert Edward Hine, then four years old, their only child.

The will provided that in the event of the death of the son after the marriage of the mother, if it happened, the realty upon her decease should be sold and the proceeds of sale distributed among certain lineal or collateral relations of the testator, and that if the wife remarried during the life of the son, she was to retain but one-half of the income of the estate and pay over the remainder to a trustee for the use of the son.

On March 6, 1899, Mrs. Hine, in order to effect a sale of this house and lot on L street, filed a bill in equity in the court below against her son Robert Edward, alleging that he was then 9 years

of age, and against thirteen other persons by the bill alleged to be the lineal or collateral relatives of the testator by his will intended, and the bill averred that all of these were nonresidents of the District of Columbia, some of them in South Africa, Australia, and England, and that four of them were infants.

The bill alleged that the complainant was still unmarried and that under the will of her deceased husband she was tenant for life of this L street property in which her son held a vested remainder in fee with contingent limitations over in favor of the other defendants; that the dwelling-house was deteriorating for want of repairs, and was at times without a tenant; that $8,500 could be obtained for the property and that it would be better for the interests of all concerned for the property to be sold and the proceeds invested under Section 973 of the Revised Statutes of the District of Columbia and that said will in no manner prohibited, but really contemplated such a sale. Amongst other things the bill prayed for the appointment of a guardian *ad litem* for the infant defendant, for a decree for a sale of the property by a trustee to be appointed for that purpose, for the investment of the proceeds of sale under section 973 just mentioned, for payment of the income of the fund to the complainant during her lifetime and the distribution of the principal sum after her decease in accordance with the provisions of the will which it was prayed might be proven and established by decree.

The appellants contend that the court possessed no jurisdiction of the case made by the bill and could render no valid decree under it. Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority its judgments and orders are regarded as nullities. They are not voidable, but simply void and form no bar to a recovery sought, even prior to a reversal, in opposition to them. For the operation of every judgment must depend upon the power of the court to render that judgment, or in other words, on its jurisdiction over the subject-matter which it has determined. And even though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its mode of procedure and in the extent and character of its judgment. And though there be jurisdiction for certain purposes in a cause, the jurisdiction may be exceeded in the judgment. Where the ultimate judgment is founded upon any order or process which the court was without authority to direct, the judgment itself is a nullity. Elliott et al. v. Peirsol et al., 1 Pet., 328, 340; Rose v. Himely, 4 Cranch, 240, 269; Windsor v. McVeigh, 93 U. S., 274, 284; Williamson et al. v. Berry, 8 How., 495, 542; Lamaster v. Keeler, 123 U. S., 376, 391.

The question of jurisdiction is always examinable collaterally. Whatever may be the circumstances, whenever a right is asserted under a judgment or decree, the jurisdiction of the court which has awarded it becomes the subject of inquiry. While the judgment of every court acting within the sphere of its jurisdiction is exempt

from collateral attack, directly the reverse of this is true in its relation to the judgment of any court acting beyond the pale of its authority, for the jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceeding. What another court may do the court which entered the judgment or passed the decree may do. Reynolds v. Stockton, 140 U. S., 254, 264, etc.; Wilcox v. McConnel, 13 Pet., 496, 511; Elliott et al. v. Peirsol, supra, 341; Thompson v. Whitman, 18 Wall., 457, 468.

The equity court has no inherent power to decree the sale of an infant's real estate for the purpose of investment, and its jurisdiction to decree the sale of an infant's realty is wholly statutory. Prior to the Code there was no statute in this District whereby a court of equity could decree a sale of a vested remainder in fee in lands belonging to an infant at the suit of the tenant for life. At the time this bill was filed, it appears there were but four classes of cases of statutory grant of authority, in equity, to order the conversion of realty into personalty, and the bill we are now considering does not make a case within either of these four classes. Thaw v. Richie, 5 Mack., 200, 201, 202; Stransbury v. Inglehart, 20 App. D. C., 147; Trust Co. v. Muse, 4 App. D. C., 20; Clark v. Mathewson, 7 App. D. C. 384. These cases show that prior to the adoption of the Code there existed no statutory authority in this District for the sale of a vested remainder in fee in lands belonging to an infant at the suit of the tenant for life, and it appeared on the face of this bill that the estate of the infant Robert Edward Hine was a vested remainder in fee. This bill made the thirteen lineal or collateral relations of the testator before referred to co-defendants with the infant remainderman Robert Edward Hine and four of these were infants. But at that time there was no statutory authority in this District to decree a sale at the suit of a sole tenant for life of the contingent interest in land limited over by will or deed to persons, infants, or adults, not being *issue* of such tenant for life. Appellee's counsel claim that this bill was founded on Section 969, Rev. Stat. D. C., but that statute empowered the court in equity to decree the sale of real property only when the estate was limited to one or more for life or lives with contingent limitations over to such *issue* of one or more of the tenants for life as should be living at the death of either parent or parents. It appeared upon the face of the bill and also in the testimony supporting it that none of the thirteen co-defendants mentioned as the beneficiaries of the contingent limitations contained in this testator's will were in any wise related to the complainant except through affinity and as being mother, brother, sister, or nephew of her deceased husband, the testator. It is manifest that these proceedings contemplated a sale of the interests in the property of all the defendants to the bill and by the express terms of the decree for sale, the title of all of them is divested from the parties to the suit and vested in the trustee for the purpose of making the sale and conveyance. The declaration in this cause below averred that the bond sued on, given in the suit in equity was

executed "in accordance with the requirements of" the decree for sale, and in order that Waggaman "might be qualified to act and should act as trustee to make the sale."

Not only does it appear that the equity court below possessed no jurisdiction of the case made by the bill, but if we assume that in such a case that court had jurisdiction by statute the proceedings lack the particularity in following statutory methods for affecting title to real property so important to observe lest a decree in such proceedings be a nullity.

The infant Robert Edward Hine was served with process and all other defendants, not residents, were returned *non sunt*. The complainant on April 26, 1899, obtained an order of publication against the nonresidents requiring their appearances to the suit on or before the first rule day of the court below occurring forty days after the date of the order, which was to be published "once a week for three successive weeks in The Washington Law Reporter and in The Evening Star." This order stated that it was the object of the suit "to sell sublot 32 in square 164, Washington, D. C., and reinvest proceeds." The period thus designated for the appearances of the nonresidents was that prescribed by Rev. Stat. D. C., section 787, and by the common law rule of the court below then in force, which provided that "the proof of publication" should be by the affidavit of the publisher or manager of the newspaper, and that such affidavit should "state how many and at what time the order was published in the paper."

The affidavit of the manager of The Washington Law Reporter filed June 7, 1899, and the certificate accompanying it disclosed that the order had been published "in the regular issues of that weekly newspaper bearing date April 27th, May 4th and 11th, 1899." The affidavit of one of the publishers of The Evening Star, filed on June 7, 1899, and the certificate therewith disclosed that the order had been published in that paper on "April 29th, and May 6th and 13th, 1899." This order instead of being published in both journals weekly for the space of three weeks or twenty-one days, was published in neither (though weekly) for more than fifteen days. We need only refer to Guaranty Trust Co. v. Green Cove R. R., 139 U. S., 137, 146-148, to show the insufficiency of such publications, for when constructive service of process by publication is substituted in place of personal service the statutory provision must be strictly pursued in order to bind a citizen of another State not personally present. Every principle of justice exacts a strict and literal compliance with the statutory provisions. See, also, Galpin v. Page, 18 Wall., 350, 368, 369; Leach v. Burr, 17 App. D. C., 137; It is true the decree *pro confesso* recited that the order of publication had been duly published as therein directed, but this recital, being the narration of a jurisdictional fact, can not prevail against the truth disclosed elsewhere in these equity proceedings. Settlemier v. Sullivan, 97 U. S., 444, 448-449; Cheely v. Clayton, 110 U. S., 701, 708. Again this order of publication of April 26, 1899, required the nonresident defendant to appear to the suit on or before the first rule day occurring forty days after the date of the order and the first

Tuesdays of the month then constituted the rule days of that court. In 1899 the first Tuesday in June fell on the first day of that month, and the first Tuesday in July on the fourth day of that month, a legal holiday. Only thirty-six days had expired on June 1st, wherefore the nonresident defendants were not required by this order to appear to the suit before July 5, 1899, yet on June 7, 1899, for want of such appearance to the suit, the complainant secured a decree *pro confesso* against all of the adult nonresident defendants and the cause proceeded *ex parte*.

A decree rendered in advance of the period at which the court may lawfully acquire jurisdiction over defendants is void. Whenever notice or citation is required the party cited has the right to appear and be heard, and when the latter is denied the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is, in legal effect, the recall of the citation period. Sturges v. Hancock, 4 App. D. C., 293; 697; Windsor v. McVeigh, supra, 274, 278; Harris v. Hardeman et al., 14 How., 333, 339-341. The fact that the final decree for sale was not made until July 6, 1899, does not cure the defect, for though, for want of appearance, a decree *pro confesso* might then have been taken against them, the equity rules of the court below thereupon prohibited the entry of any final decree against them prior to the rule day in August next, and the final decree for sale makes absolute the decree *pro confesso*, and as to the adult defendants rests upon the latter decree, and, if the decree *pro confesso* against them was void, so must be the final decree as to them also. Lamaster v. Keeler, *supra*, 376, 391; O'Hara et al. v. MacConnell et al., 93 U. S., 150, 153.

Thomas E. Waggaman was appointed guardian *ad litem* for all the infant defendants. By the terms of the final decree of July 6, 1899, Waggaman was appointed trustee for sale upon giving bond with surety to the United States in the penalty of $18,000, and he was authorized to sell for cash or upon time, and upon the ratification of the sale and payment of the purchase money to make conveyance to the purchaser, *and to bring the proceeds of sale into court to be disposed of under the direction of the court*. The object of this suit was to effect such a sale of the property as would embrace the interests therein of all the parties to the bill. The bond given on July 7, 1899, by Waggaman, who had been "duly appointed trustee to make sale," and by his surety Daniel B. Clarke, now deceased, was in the usual form. The latter in his affidavit of defense says that he had no reason to believe that the cause, the decree, or the bond were open to any exception whatever, either of law or of fact. On July 20, 1899, Waggaman, trustee, reported a sale of the premises to Mr. Hay and this sale was finally ratified. The declaration alleges that Waggaman received the whole of the purchase money on July 19, 1899, though more likely it happened after August 2, 1899, the date of the final ratification of sale. No report or return of these proceeds was made by Waggaman to the court until May, 1905.

On February 15, 1905, Robert Edward Hine, the complainant's infant son, by next friend, filed a petition in the equity cause we

have considered, calling upon Waggaman to state his account as trustee and to bring the fund into court. On May 15, 1905, Waggaman, answering, admitted his appointment and qualification as trustee, the final ratification of the sale; that he had received $8,500 in cash for the premises and that after the payment of expenses there had remained in his hands a net balance of $8,147.72, as shown in the account dated August 31, 1899, on which day he had transmitted a copy of the account to Mrs. Hine and annexed another to his answer or report. He represented that Mrs. Hine, as tenant for life, being entitled to the income for life of these net proceeds on August 31, 1899, had agreed with him that he should retain the $8,147.72 and pay her five per cent interest quarterly thereon, and that he had paid such interest quarterly until some time in the year 1904, and that the fund had remained in his possession and that thereafter he became bankrupt and became unable to pay either principal or interest. The account referred to is that of Waggaman, real estate broker, in account with himself as trustee in the equity cause we are here considering. After further proceedings upon this petition, on November 21, 1905, the court below in equity signed a decree directing Waggaman within ten days to pay into court $7,147.72, with interest from August 1, 1904. His bankruptcy rendered it impossible to make such payment.

The action before us is grounded upon the conclusiveness of the decree for sale as between the parties to this action and for the recovery of the entire net proceeds of the sale for the use and benefit of the equitable plaintiffs in this action. Because Waggaman was bankrupt the decree of November 21, 1905, was designed to affect the right of Clarke, the surety on the bond, but since the court below in equity was without jurisdiction to render the decree for sale, the subsequent decree could not ratify the former.

The declaration in the action we are here considering was filed in an action brought on March 5, 1906, upon the bond before mentioned against the insolvent principal, Waggaman, and the surety, Clarke, by the United States "at the instance and to the use of" Mrs. Hine and her son. The declaration was in debt for the penalty of the bond, and the judgment was for the penalty to be released upon payment of $8,147.72 with interest from August 1, 1904, and costs. This declaration assigns two breaches of the bond, a breach of duty by the trustee in omitting to pay the balance of the purchase money into the registry of the court agreeably to the decree of July 6, 1899, and a breach of duty by the trustee in omitting to make such payment agreeably to the decree of November 21, 1905.

This declaration contains no averment of the rights or interests of those at whose instance and to whose use the action was brought, and because the true nature of the proceedings in equity were not disclosed by the declaration, the defendant below set forth the record by plea. In such a case as this, the Federal courts regard the real and not the nominal plaintiff; as in Maryland the State possesses no interest in the bond, so in this District the United States is a nominal plaintiff only. The bond can be put in suit only by some

person whose legal rights have been injuriously affected by a breach of its condition.

This action is founded upon the conclusiveness of the decree for sale, upon the validity of the sale as between the parties to the action, and upon the title of the equitable plaintiffs to the net proceeds of the sale and is for the sole use and benefit of the equitable plaintiffs whose interests are not alleged to be joint but are shown by the record to be separate. The able counsel for appellants contends that if no recovery could be had by Robert E. Hine, the infant, the right of Mrs. Hine, the life tenant, to recover could extend only to the present money value of her life estate in the net balance of the proceeds of sale; that if no recovery could be had in right of Mrs. Hine, the recovery in the interest of her infant son could extend only to the present money value of his interest in the net balance of the proceeds of sale computed under all of the provisions of the will; that a plea in bar, if sustainable as to the right of one of the equitable plaintiffs in the action would not only render necessary an inquiry as to the nature of the recovery admissible, in the interests of the other, but would appear to require the intervention of a jury for its solution and, therefore, the Seventy-third Rule of the court below would appear inapplicable.

In order to bring before the court the true character of the bill and the proceedings thereunder, the defendant below pleaded in confession and avoidance as to each breach before mentioned, and as to the separate interest of each of the equitable plaintiffs and after introducing in the pleas, by way of inducement, the will of the testator, which had been omitted from the record, the transcript of the record in the equity proceeding was made part of the pleas. The pleas to both breaches conceded an apparent right of action in the plaintiffs upon the matter set up in the declaration but avoided that apparent right by the use of the transcript of the record in equity to show that the proceedings under the bill were *coram non judice* and that the bond executed to effect a sale of the property was given for the attainment of an unlawful object; and to each of the breaches in respect of the interest of Mrs. Hine the surety in effect pleaded his discharge. These latter pleas in substance averred that on August 31, 1899, while Waggaman still retained the proceeds of sale, Mrs. Hine claiming to be the beneficiary for life of the fund, had without the knowledge or assent of the surety, entered into an arrangement with Waggaman by which he was to continue to retain the fund without returning or reporting the same to the court and to pay her interest upon the fund at the rate of five per cent; that thereafter in pursuance of this arangement, Waggaman for several years, without the knowledge or assent of the surety had retained possession of the fund without returning or reporting the same and paid interest as agreed, and had while so retaining the fund expended the same for his own use so that the fund by reason of his bankruptcy became irrecoverable.

We omit detailed discussion of the plaintiff's affidavit and of the affidavit of defense, because of the great length thereof, and also because in our opinion under the pleadings it was clear that the

Seventy-third Rule of the court below was not applicable to this case. Suffice it to say, the affidavit of defense with clearness and precision denied the right of the plaintiff to recover in whole or part the money claimed in the declaration made adequate reference to the transcript of record annexed to the defendants' pleas and affirmed that over the cause embraced in such transcript the court possessed no jurisdiction; that as to the affiant all of the proceedings in the said cause were null and void, and that the said bond was given for the accomplishment of an illegal end and object. The affidavit then with clearness and precision declared that such illegality and nullity constituted part of the ground of defense of the affiant to the present action and further set forth the other ground of defense, namely, that if he was liable originally upon the bond he was discharged as a surety by reason of the transactions between Mrs. Hine and the trustee from any liability to her upon the bond sued on because of the matters set out in the pleas under the arrangement therein alleged to have been entered into and consummated without the knowledge or consent of the surety. The learned counsel for appellants rightfully urges that the defense in this case is such that its sufficiency must be determined upon the pleadings or upon the pleadings and proof and not as a side or collateral question upon the affidavit and that the Seventy-third Rule under the decision of this court in the case of Bailey v. District of Columbia, 4 App. D. C., 370; was not applicable to this case.

We have decided that the decree in the equity proceedings here discussed was void, and therefore the bond here sued upon is without force as a statutory obligation because it was not such a bond as was authorized by law to be given in that proceeding.

The court below held that even if the equity court of this District had been altogether without jurisdiction over the real estate with which this equity suit was concerned, the bond sued upon is a valid common law obligation. The United States possessed no legal interest in the bond, and because it was given by a trustee under a decree for sale, which was void, it was without force as a statutory obligation, and it was such an instrument that no action could be maintained thereon in this District as a common law obligation either by the United States or for the benefit of these equitable plaintiffs. The object as well as the terms of the bond negatived the intention of the surety to enter into a common law obligation. The surety sued in this action, if bound at all, was to be bound not for a principal charged with common law liabilities, but for the conduct of a trustee subject to the jurisdiction and control of the court of equity administering the trust, reducing through such judicial supervision of the trustee liability to loss on the part of the surety. United States v. Draper, 19 D. C. Rep., 92; United States v. Pumphrey, 11 App. D. C., 49.

As the equity court had no jurisdiction whatever in the matter under the void decree, there was no legal appointment of this trustee, and it was legally impossible for the trustee to perform the conditions of the bond according to its true spirit or meaning. The surety intended to become liable for a trustee who was under the

jurisdiction of the equity court who in administering the trust must conform to the rules and practice of that court. To hold the surety bound as upon a voluntary contract to be responsible for a trustee not subject to the jurisdiction of an equity court would be to change the character of the contract the surety intended to assume and would increase his liability. The bond was not given to accomplish anything save what might have been accomplished by a bond of a trustee for sale in equity. It was not given in pursuance of any agreement between the parties, but only in compliance with a statutory requirement. It did not and could not have that effect, and was therefore wholly without consideration and void, and could not be valid as a common law undertaking. Conant v. Newton, 126 Mass., 109; Powers v. Chabot, 93 Cal., 269. Bonds conditioned for lawful purposes may in general be enforced though not drawn in conformity with the statute or when not required by statute, but this bond, which was not authorized by law to be given in this judicial proceeding, being void for the reasons we have stated, could not be valid and enforceable as at common law. The obligation which the United States may enforce for the equitable plaintiffs in its name must be a valid obligation. United States v. Linn et al., 15 Pet., 290, 310; Tyler v. Hand et al., 7 How., 572, 583; United States v. Hodson, 10 Wall., 395, 408; Jessup v. United States, 106 U. S., 147, 152.

Nor can we agree with the court below that the recital in the bond "that Waggaman had been duly appointed trustee to make the sale," and while so acting made the sale and received the proceeds of the sale, estopped his surety from denying the jurisdiction of the equity court to adjudge the sale to be made. When this court can see that the equity court below was without jurisdiction it must so decide, no matter what the parties may have admitted by recital. It is true there may be an estoppel by deed, but a void deed is no deed and can create no estoppel. If any individual can not be estopped by recitals in an instrument which is no deed, he should not be estopped by recitals contained in a judicial record which is no record so far as his obligation is concerned. As the Supreme Court said in the case of Harris v. Hardeman et al., 14 How., 333, 340, quoting Starbuck v. Murray, 5 Wend., 157: "But it is contended that, if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it can not be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the supposed record is, in truth, no record. If the defendant had not proper notice of, and did not appear to, the original action, all the State courts, with one exception, agree in opinion that the paper introduced as to him is no record, but, if he can not show, even against the pretended record, that fact, on the alleged ground of the uncontrollable *variety* of the record, he is deprived of his defense, by a process of reason-

ing that, to my mind, is little less than sophistry. The plaintiffs, in effect, declare to the defendant the paper declared on is a record, because it says you appeared; and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped from proving any fact which goes to establish the truth of a plea alleging the want of jurisdiction."

A mere recital in a bond can not preclude the obligor from showing the instrument to be void. The principle determined in Daniels v. Tearney, 102 U. S., 415, relied upon by the appellee, was grounded upon the estoppel arising in favor of an innocent obligee. In that case, the obligor executed a bond whereby he secured advantages such as he would have attained had the proceedings throughout been lawful. He had enjoyed the fruits of a contract fairly made, and under the circumstances he could not when called to account deny the existence of the power to make it. Here in a void proceeding where the surety went upon a bond for what proved to be an unlawful object, the obligee, who had participated in that object, can maintain no action upon the bond. In Daniels v. Tearney (page 420), it was said: "If parties are *in pari delicto* the law will help neither, but leaves them as it finds them." And concerning the obligee in the bond, the court said (page 419): "The creditor was not to be consulted. His assent was not required. So far as he was concerned the sheriff could proceed *in invitum*. The option to give the bond or not was with the debtor. The presence or absence of the creditor, and his assent or dissent, were alike immaterial. He was powerless in any event to control the result."

In the case before us the complainant, Mattie McC. Hine, secured the decree requiring the trustee to give the bond upon which she brought this suit. The surety had no notice or information except what might be drawn from the instrument or imputed to him by the proceedings. Robert E. Hine, the infant, would appear not to have been divested of his interest in the property by this proceeding and if not, and we do not here decide it, it is not clear that he has suffered damage by reason of the breaches of the obligation of this bond. It must not be forgotten that the surety's obligations are *strictissimi juris*.

It would prolong this discussion to consider whether or not the surety upon this bond was discharged from obligation to Mrs. Mattie McC. Hine by reason of extension to Waggaman of the time of payment prescribed by the decree. We have determined that the decree was void and that the bond given under it was also void. It is unnecessary to review particularly the affidavit of defense filed with the defendant's pleas. Let it suffice to say that in our opinion the defendant's affidavit in conformity with the Seventy-third Rule denied the right of recovery by the plaintiff in whole or in part and specially stated in precise and distinct terms the grounds of defense and these grounds were sufficiently proved to defeat the plaintiff's

claim. It was matter of record which formed the ground of defense in the affidavit of these defendants as happened in Bailey v. District of Columbia (*supra*), 356. The affidavit of the surety avers in effect that upon his information and belief all of the proceedings in the suit in equity were without jurisdiction and null and void, and that the bond was executed for the attainment of an unlawful object, and that such want of jurisdiction, nullity and illegality constitute part of the defense of the surety to the action, and avers as another element of defense his discharge as for the interest of Mrs. Mattie McC. Hine arising from the arrangement made between Waggaman, trustee, and himself. The transcript of the record in the equity suit had been annexed to his pleas, wherefore no special statement as to the contents of that record was necessary in the affidavit of defense as the record would speak for itself. In this case, considering the particularity of the special pleas, a reiteration of each fact contained in the plea was not required in the affidavit under the Seventy-third Rule. It should be apparent from all we have said that this rule for a summary judgment is hardly applicable to a case such as this wherein the sufficiency of the defense thus made must be determined upon the pleadings, or upon the pleadings and proof, and not upon a side or collateral question upon the affidavit. Sufficient facts were stated to enable the court to see that if true they constitute a good defense.

We need not review the authorities relied upon by the appellee. In our opinion the best considered cases among them do not conflict with the views we have expressed. The judgment in this case must be reversed with costs. It is a judgment upon the pleadings and should, therefore, be remanded for further proceedings not inconsistent with this opinion, and it is so ordered.

THURSDAY, *May* 21*st*, *A. D.* 1908.

April Term, 1908.

No. 1899.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE, Appellants,

vs.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and on a motion to affirm which was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. CHIEF JUSTICE SHEPARD.
May 21, 1908.

TUESDAY, *June 2nd, A. D.* 1908.

No. 1899.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE and ROBERT E. HINE, Appellants,

vs.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA, and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, Deceased.

On motion of Mr. C. A. Keigwin, of counsel for the appellants, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United States of America, to the use of Mattie McC. Hine and Robert E. Hine, Appellants, and Alexander Porter Morse, The Union Trust Company of the District of Columbia and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, deceased, Appellees, a manifest error hath happened, to the great damage of the said Appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 2nd day of June, in the year of our Lord one thousand nine hundred and eight.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Mattie McC. Hine, as principal, and Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Alexander Porter Morse, The Union Trust Company of the District of Columbia and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, deceased, in the full and just sum of Three hundred dollars to be paid to the said Alexander Porter Morse, The Union Trust Company of the District of Columbia and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, deceased, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this Ninth day of June, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the United States of America to the use of Mattie McC. Hine and Robt. E. Hine, Appellants, vs. Alexander Porter Morse, The Union Trust Company of the District of Columbia and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, deceased, a judgment was rendered against the said the United States of America, to the use of Mattie McC. Hine and Robt. E. Hine, Appellants, and the said the United States of America to the use of Mattie McC. Hine and Robt. E. Hine, Appellants having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Alexander Porter Morse, The Union Trust Company of the District of Columbia and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, deceased, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said the United States of America to the use of Mattie McC. Hine and Robt. E. Hine, Appellants, shall prosecute said writ of error to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

MATTIE McC. HINE. [SEAL.]
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, [SEAL.]
By W. H. RONSAVILLE, [SEAL.]
Attorney-in-Fact.

[Seal of Fidelity and Deposit Company of Maryland.]

Sealed and delivered in the presence of—
T. L. MILLER.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1899. The United States of America, to the use of Mattie McC. Hine and Robert E. Hine, Appellants, vs. Alexander Porter Morse, The Union Trust Company of the District of Columbia and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, deceased. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun. 13, 1908. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Alexander Porter Morse, The Union Trust Company of the District of Columbia, and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America to the use of Mattie McC. Hine and Robert E. Hine are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, — Justice of the Court of Appeals of the District of Columbia, this 13th day of June, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 13th day of June, A. D. 1908, waiving nothing.

JOHN SELDEN,
Attorney for Defendants.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun. 13, 1908. Henry W. Hodges, clerk.

In the Court of Appeals, District of Columbia.

No. 1899.

THE UNITED STATES OF AMERICA to the Use of MATTIE McC. HINE et al., Plaintiff in Error,

vs.

ALEXANDER P. MORSE et al., Executors, &c.

Assignment of Errors.

The above named plaintiff in error, having sued out a writ of error from the Supreme Court of the United States to obtain revision by the said Court, of the judgment entered in the above entitled cause by the Court of Appeals of the District of Columbia, hereby assigns as errors in the said judgment, that the said Court of Appeals, in entering the same, erred in the particulars following, that is to say:

I. In affirming the judgment entered in the said cause by the Supreme Court of the District of Columbia.

II. In not reversing the said judgment entered by the said Supreme Court of the District of Columbia.

III. In holding that the demurrer interposed by the now plaintiff in error to the plea filed by the now defendants in error, was properly overruled, and in rendering judgment accordingly.

IV. In holding that the pleadings filed by the now defendants in error were sufficient and valid to bar the action, and in rendering judgment accordingly.

Wherefore it is prayed that the said judgment of the said Court of Appeals be reversed, with direction to the said court to direct that the judgment herein of the Supreme Court of the District of Columbia be reversed.

WILLIAM H. ROBESON,
CHAS. A. KEIGWIN,
Attorneys for Plaintiff in Error.

Service of a copy of the foregoing assignment of errors is hereby acknowledged, waiving nothing.

JOHN SELDEN,
Attorney for Defendants in Error.

(Endorsed:) No. 1899. The United States to the use of Hine, et al., v. Alex. P. Morse et al. Assignment of Errors. Court of Appeals, District of Columbia. Filed Jun- 23, 1908. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 72, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States of America to the use of Mattie McC. Hine and Robert E. Hine, Appellants, vs. Alexander Porter Morse, The Union Trust Company of the District of Columbia, and Daniel Boone Clarke Waggaman, Executors of Daniel B. Clarke, deceased, No. 1899, April Term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 26th day of June, A. D. 1908.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,255. District of Columbia Court of Appeals. Term No. 196. The United States of America to the use of Mattie McC. Hine and Robert E. Hine, plaintiffs in error, vs. Alexander Porter Morse, The Union Trust Company of the District of Columbia, and Daniel Boone Clarke Waggaman, executors of Daniel B. Clarke, deceased. Filed July 8th, 1908. File No. 21,255

Supreme Court of the United States,

OCTOBER TERM, 1909.

No. 196.

THE UNITED STATES OF AMERICA to the use of MATTIE McCABE HINE and ROBERT E. HINE,
Plaintiffs in Error,

vs.

ALEXANDER PORTER MORSE, THE UNION TRUST COMPANY OF THE DISTRICT OF COLUMBIA and DANIEL BOONE CLARKE WAGGAMAN, Executors of Daniel B. Clarke, deceased.

STATEMENT AND BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

Statement of the Case.

This case comes to this Court on a writ of error to the Court of Appeals of the District of Columbia, bringing up for review a final judgment of the Court of Appeals overruling the demurrer of the plaintiffs in error as plaintiffs below, to certain pleas

interposed by the defendants in error, defendants below, to the plaintiffs' declaration, and adjudging that as plaintiffs elected to stand upon their demurrers to the pleas they should take nothing by their action, and that final judgment should be for the defendants (Tr., p. 56; side p. 64, and Tr., p. 58).

This action was begun in the Supreme Court of the District of Columbia as an action at law brought in the name of the United States to the use and benefit of plaintiffs in error, Mattie McCabe Hine and Robert E. Hine *v.* Thomas E. Waggaman, as principal, and Daniel B. Clarke as his surety, upon a bond given by the said Waggaman and Clarke in a suit in equity in the Supreme Court of the District of Columbia wherein Mattie McCabe Hine was complainant and Robert Edwin Hine *et al.*, were respondents.

The bond sued upon in this action was duly entitled, approved and filed in the equity suit named and was, in substance, as follows:

"Know all men by these presents, that we, Thomas E. Waggaman, principal, and Daniel B. Clarke, surety, all of the District of Columbia, acknowledge ourselves indebted to the United States of America in the penal sum of eighteen thousand dollars, for the payment of which we bind ourselves and every of our heirs, executors and administrators, jointly and severally, for and in the whole. Sealed with our seals, and dated this 7th day of July, A. D. 1899.

Whereas, the said Thomas E. Waggaman has been duly appointed trustee to make sale of the real estate in the proceedings in this cause mentioned;

Now the condition of the above obligation is such, that if the above bounden Thomas E. Waggaman shall well and truly discharge the duties devolving upon him as such trustee and shall in all things obey such order and decree as this Court shall make in the premises, then the above obligation to be

void and of no effect; else to be in full force and virtue" (Tr., p. 3).

This bond, as the transcript at the page last referred to shows, was duly signed by Waggaman and Clarke, and approved by a Justice of the Supreme Court of the District of Columbia on the 7th day of July, 1899, as a part of the proceedings in the said equity suit.

In the suit in equity in which this bond was executed, there is no dispute that a sum of money amounting to $8,500 was realized through the sale by said Waggaman as trustee under appointment of the Court in said suit, of certain real estate in the District of Columbia; that he received the proceeds of such sale into his hands as trustee; that he converted the money to his own use and did not obey an order and decree subsequently entered in the equity suit directing and requiring him to pay over the moneys in his hands as trustee and account for the same. The undisputed facts in this regard are so clearly and briefly set forth in the affidavit of C. A. Keigwin, Esq., exhibited with the declaration in this case, that it does not seem necessary to repeat them here, and reference is made to said affidavit (Tr., pp. 6–9).

In this same connection we refer to the declaration of the plaintiffs in error, as plaintiffs in the action at law upon the bond above recited, seeking to recover under the terms of the bond for the default of Waggaman (Tr., pp. 1-6).

The net amount in Waggaman's hands as trustee, and for which he was required by an order entered in the equity suit on November 21st, 1905, to account, was $8,147.72, with legal interest from the first day of August, 1904 (Tr., p. 5). Clarke, as surety, having been notified of Waggaman's default and the order of the Court in the equity cause requiring the payment of the money into the Registry of the Court by Waggaman, and his failure to comply with the order, nevertheless refused pay-

ment as surety, and this action followed (see declaration and supporting affidavit, Tr., pp. 1–9).

The declaration alleges breaches of the condition of the bond, first, by Waggaman as principal, and second, by Clarke as surety (Tr., pp. 8 and 9). The defendant Waggaman could not be found within the District of Columbia, and service was not made upon him, but the defendant Clarke was duly served (Tr., p. 9), and filed pleas to the declaration (Tr., pp. 9 to 15). With his pleas he presented an affidavit of defense (Tr., pp. 15–18). In connection with the pleas, and as a part thereof, the defendant Clarke exhibited "A," the last will and testament of Robert B. Hine, deceased, who was the father of the plaintiff Robert E. Hine, and the husband of the plaintiff Mattie McCabe Hine. Defendant Clarke also exhibited with said pleas, as a part thereof, "B," a transcript of the proceedings in the equity suit in the Supreme Court of the District of Columbia, wherein Mattie McCabe Hine was complainant, and Robert Edwin Hine and the other heirs at law and devisees of Robert B. Hine, deceased, were respondents.

The will appears in the transcript (Tr., pp. 18–21). A transcript of the proceedings in the equity suit appears in the transcript (Tr., pp. 21–43).

The final order entered in the equity suit on November 21st, 1905, directing Waggaman to pay the money into the Registry of the Court, reads as follows:

"This cause coming on again to be heard upon the motions heretofore filed by the complainant Mattie McC. Hine and the defendant Robert E. Hine, by his next friend, for an order requiring Thomas E. Waggaman, trustee appointed herein by this court, to pay into court the sum of $8,147.72, reported by the said trustee to be due from him, upon consideration of the said motions and of the answer made by the said trustee to the rule

heretofore laid upon him to show cause why he should not pay the said sum, it is this 21st day of November, 1905, adjudged, ordered and decreed that the said Thomas E. Waggaman pay into the registry of this court the said sum of $8,147.72 with legal interest thereon from the 1st day of August, 1904, within ten days from service of a copy of this order upon the solicitor of the said Thomas E. Waggaman" (Tr., p. 43).

After the filing of pleas as aforesaid by defendant Clarke in the action at law, a motion for judgment, because of the want of a sufficient affidavit of defense with the pleas, was made in behalf of the plaintiffs in this action (Tr., pp. 43–44). This motion came on for hearing before Mr. Justice Anderson of the Supreme Court of the District, and on May 28th, 1906, Judge Anderson handed down an opinion, holding that Waggaman and Clarke were liable upon the bond and directing judgment against the defendant Clarke for the penalty of the bond, to be released upon the payment by said defendant of the sum of $8,147.72 with interest thereon from the 1st day of August, 1904, together with the costs of the suit (Tr., pp. 44, 45–47).

The opinion of Mr. Justice Anderson in so far as it passes upon the questions involved upon this writ of error to this Court so succinctly and clearly states the legal propositions upon which the plaintiffs in error rely that we quote from it as follows. Mr. Justice Anderson said, "Nor can the next ground of defense urged by the defendant Clarke be sustained, namely, that the equity court had no jurisdiction to decree the sale of the fee-simple title to the real estate, and that therefore the whole proceedings were void.

In the first place, bearing in mind that the present suit is being prosecuted by the United States of America, the obligee of the bond, against the obligor, Waggaman, and the surety thereon, Clarke, to recover funds received by the obligor, Waggaman, under the decree of the equity court passed in 1899,

it is quite clear that they are estopped from denying the jurisdiction of the Court to pass the decree, no matter whether such decree is valid or invalid. If the decree is valid, the United States is entitled to enforce the bond for the recovery of the money, in order that the same may be paid over to the parties to the cause in the proper proportions; and if invalid, the United States has equal right to sue upon this bond for the recovery of the money, in order that it may make a proper refund to the purchaser at the sale, and thereby remedy the mistake. Moreover, the defendant Clarke is conclusively presumed to have understood the terms of the bond at the time he signed and sealed it, and one of the express covenants of the bond reads as follows: 'Said Thomas E. Waggaman has been duly appointed to make sale of the real estate in the proceedings in this cause mentioned.'

In making such sale, Waggaman was acting under the terms of this covenant, and, having received the proceeds of the sale pursuant to the decree, he is now estopped, and his surety is likewise estopped, from denying the jurisdiction of the Court to enter the decree.

In the second place, even granting that the Court was without jurisdiction to decree the sale of the fee-simple title to this real estate, it had undoubted power to decree the sale of the life estate of Mrs. Mattie McC. Hine, the complainant in that suit, and therefore it had jurisdiction of the cause to that extent at least, and hence it cannot be said to have been wholly without jurisdiction. In the case of Trust Co. *v.* Muse, 4 App. D. C., 12, cited in the course of the argument, the purchaser at the sale took a direct appeal from an order of the Court confirming such sale, on the ground that the Court could not convey him a complete title, for the reason that it had no power to convey the interest in remainder, and therefore

was without authority to pass a perfect title to the real estate; and the Court of Appeals sustained the contention of the purchaser and reversed the Court below. In the case at bar, however, the objection that the Court was without power to pass a perfect title is not one raised by a bidder, but is collaterally raised by the surety on the bond, and, since the Court, as already stated, was not altogether without jurisdiction over the real estate, and hence its decree was not an absolute nullity, the surety, even were he not otherwise estopped, could not defend here by alleging a mere error of the Court in exceeding or unduly extending the scope of its authority.

And finally, even if the Court had been altogether without jurisdiction over the real estate, the bond sued upon is a valid common law obligation, and enforceable as such" (Tr., pp. 46, 47).

After the entry of the judgment based upon this opinion, an appeal was prayed and granted to the defendant Clarke, taking the case to the Court of Appeals of the District of Columbia (Tr., p. 44). Subsequently, Clarke died and his executors, who are the defendants in error here, were made parties defendant in his place (Tr., pp. 47–48).

The appeal of the defendants in error from the aforesaid judgment of the Supreme Court against the surety, Clarke, came on to be heard in the Court of Appeals of the District of Columbia in May, 1907, and the judgment for the plaintiffs was reversed (Tr., pp. 48–49).

The opinion of the Court of Appeals of the District of Columbia reversing this judgment appears in the transcript, although it is there printed out of the regular order of the proceedings in the case (Tr., pp. 59–69). After the reversal of the judgment in favor of the plaintiffs, the case came on for further hearing in accordance with the mandate of the Court of Appeals in the Supreme Court of the District. After some interlocutory proceedings not

necessary to refer to, plaintiffs, on December 6th, 1907, filed their replication to so much of the pleas as set up a release for the surety, Clarke, through an agreement between Mattie McCabe Hine and the principal, Waggaman, such replication explicitly denying as matter of fact the alleged agreement as incorporated in the pleas, and denying that any such agreement was made. In connection with the replication to this plea, plaintiffs demurred to the residue of said pleas as matter of law, alleging said pleas to be insufficient in law (Tr., pp. 53 and 54). Thereupon the defendants filed their joinder in demurrer (Tr., p. 55), and a hearing being had upon the demurrer, final judgment was entered for the defendants. The plaintiffs electing to stand upon their demurrer, the judgment of the Court was against the plaintiffs and for the defendants, and from this final judgment plaintiffs prayed an appeal (the second appeal in the case) to the Court of Appeals of the District (Tr., pp. 56–57). On this appeal by the plaintiffs, the Court of Appeals affirmed the final judgment of the Supreme Court against the plaintiffs, upon the ground that that judgment was in accordance with the mandate of the Court of Appeals as entered upon the previous appeal (Opinion, Tr., pp. 58 and 59), and accordingly the judgment of the Supreme Court against the plaintiffs, who are the plaintiffs in error here, was affirmed with costs (Tr., p. 69).

From this judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District, sustaining the pleas and finding against the plaintiffs and for the defendants as a matter of law, and adjudging the pleas sufficient in law, plaintiffs prosecute their writ of error to this court, and as plaintiffs in error here submit the following brief and argument:

Statutory Provisions Quoted.

The original suit in equity in the Supreme Court of the District of Columbia, in which the sale of

the life estate of Mattie McCabe Hine, and of the contingent remainder to Robert E. Hine, the infant son of Robert B. and Mattie McCabe Hine, was decreed, was begun by the filing of the bill of complaint on March 6th, 1899, being suit in equity Number 20,225, wherein Mattie McC. Hine was complainant and Robert Edward Hine *et als.* were respondents (Tr., pp. 21–23).

This suit for the sale of the life estate of Mattie McCabe Hine and the contingent remainder to Robert E. Hine in certain property in Washington in the District of Columbia, which had been devised to her for life by the will of her husband, Robert B. Hine, with a contingent limitation over to Robert E. Hine, their son, was begun under the provisions of Section 969 of the Revised Statutes of the District of Columbia, which section reads as follows:

"Where real estate is limited by deed or will to one or more for life or lives, with a contingent limitation over to such issue of one or more of the tenants for life as shall be living at the death of either parent or parents, and the deed or will does not prohibit a sale, the Supreme Court of the District may, upon the application of the tenants for life, and if the Court shall be of the opinion that it is expedient to do so, order a sale of such estate, and decree to the purchaser an absolute and complete title in fee simple."

Revised Statutes, District of Columbia, § 969.

It is further provided by statute that "the proceeds of sale of such real estate shall be held under the control and subject to the order of the Court, and shall be invested, under its order and supervision, upon real and personal security or in government securities; and the same shall, to all intents and purposes, be deemed real estate and stand in the place of the real estate from the sale of which such

proceeds have arisen, and as such real estate be subject to the limitations of the deed or will."

Revised Statutes, District of Columbia, § 973.

The surety Clarke entered into an obligation that Waggaman, the trustee, shall "well and truly discharge the duties devolving upon him as such trustee and in all things obey such order and decree as the Court shall make in the premises."

§ 482 of the Code of Laws of the District of Columbia provides: "If any person appointed by order or decree of the Court to the office of trustee or to any other fiduciary office shall give bond, with surety or sureties, for the due performance of his duties, he shall not be allowed to discharge said bond by receipts, releases or acquittances from himself as attorney for parties interested, to himself as such trustee or other fiduciary; but the funds or estate for the due application whereof he is responsible shall be considered as remaining in his hands, and said bond shall continue in force as against both principal and sureties until said funds or estate shall be fully accounted for and paid over or delivered to the parties interested therein, or their attorney other than said trustee or other fiduciary duly authorized to receive the same."

ASSIGNMENT OF ERRORS.

The above-named plaintiff in error, having sued out a writ of error from the Supreme Court of the United States to obtain revision by the said court of the judgment entered in the above-entitled cause by the Court of Appeals of the District of Columbia, hereby assigns as errors in the said judgment that the said Court of Appeals, in entering the same, erred in the particulars following, that is to say:

I. In affirming the judgment entered in the said cause by the Supreme Court of the District of Columbia.

II. In not reversing the said judgment entered by the said Supreme Court of the District of Columbia.

III. In holding that the demurrer interposed by the now plaintiff in error to the plea filed by the now defendants in error was properly overruled, and in rendering judgment accordingly.

IV. In holding that the pleadings filed by the now defendants in error were sufficient and valid to bar the action, and in rendering judgment accordingly.

Wherefore it is prayed that the said judgment of the said Court of Appeals be reversed, with direction to the said court to direct that the judgment herein of the Supreme Court of the District of Columbia be reversed.

BRIEF AND ARGUMENT.

I.

The Supreme Court of the District having exercised jurisdiction over the subject matter of the suit in which the bond was given, its determination of its own jurisdiction is, after this lapse of time, binding upon all persons before the Court in that case, including the trustee Waggaman and his surety Clarke, and defendants are now precluded from questioning the jurisdiction of the Court to decree the sale, appoint the trustee and require the bond.

Florentine *v.* Barton, 2 Wall., 210, 216.
Evers *v.* Watson, 156 U. S., 527, 533.
State of Wisconsin *v.* Waupacca Bank, 20 Wis., 640.

The test of jurisdiction is whether the Court had power to enter upon the inquiry; not whether its conclusion was right or wrong.

Board of Commissioners of Lake County *v.* Platt (C. C. A.), 79 Fed. Rep., 567).
Brown on Jurisdiction, §§ 64, 65, 66.

II.

The decree of sale under which the Trustee Waggaman sold the property and acquired the funds for the security of which he gave the bond, cannot be collaterally questioned by his surety.

That defects, even of a jurisdictional character, found in the record of a cause, are not available to impeach the decree, has been repeatedly held.

The fact that the requisite jurisdictional facts do not appear upon the face of the record does not make the judgment a nullity. If the cause has been determined upon its merits, the judgment cannot be impeached collaterally.

McCormick *vs.* Sullivant, 10 Wheaton, 192.

Skillern's Exrs. *vs.* May's Exrs., 6 Cranch, 267.

The Court had undoubted power to decree the sale of the life estate of Mrs. Mattie McC. Hine and hence could not have been wholly without jurisdiction over the real estate, and the surety, even were he not otherwise estopped, could not defend by alleging a mere error of the Court in exceeding or unduly extending the scope of its authority and jurisdiction.

See Judge Anderson's Opinion, Tr., pp. 45–47.

The first point decided by any court, although it may not be in terms, is that the Court has jurisdiction; otherwise it would not proceed to determine the rights of the parties.

Clary *vs.* Hoagland, 6 Cal., 685.

Had the Court or tribunal the power, *under any circumstances*, to make the order or perform the act? If this be answered in the affirmative, then its decision under those circumstances became final and conclusive until reversed by a direct proceeding for that purpose.

Tallman *vs.* McCarty, 11 Wisconsin, 401.

"Now, it is argued that the City's interest in this undivided one-fourth is in no manner affected by the sale under the decree in the Carroll suit, because the Court, it is said, had no jurisdiction either to decree a partition or a sale of the property.

In other words, the Court had no jurisdiction of the subject matter.

"We quite agree that the Court erred in its construction of the statute, and that it ought not to have decreed the sale of one fourth interest belonging to the Carroll heirs and the City of Baltimore.

"But, while such is our construction of the statute we cannot agree that the Court, in passing the decree of July 31st, had no jurisdiction of the subject matter, and that the purchaser acquired no title to the interest sold under it. The bill was filed for the partition or sale of an undivided fourth part of the property, in which the plaintiffs and defendants were tenants in common. It was filed under the Code, Art. 16, § 99. The Court had a general jurisdiction to decree a sale of property held by co-tenants, and it had jurisdiction to determine whether, under the Code, it had the power to sell an undivided interest in the property. Jurisdiction is the power to hear and determine. If the judgment of the Court ever errs the remedy is by an appeal, and until reversed on appeal, the judgment is binding on the parties to the suit. Decree affirmed."

Dugan *v.* City of Baltimore, 70 Md., 1.

"An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the Court had general jurisdiction of the subject, although it should be erroneous. The Circuit Court for the District of Columbia is a court of record having general jurisdiction over criminal cases. An offense cognizable in any court is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction,

whether the judgment be for or against the petitioner. * * *

"Without looking into the indictments under which the prosecution against the petitioner was conducted, we are unanimously of the opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought not to be awarded."

Ex parte Watkins, 3 Pet., 191, 203, 209.

Ex parte Parks, 93 U. S., 20, was a similar case in which the Supreme Court, upon examination of the indictment, admitted that it was doubtful whether the facts therein stated constituted an offense, but held:

"But the question whether it was or was not a crime within the statute was one which the District Court was competent to decide. It was before the Court and within its jurisdiction. * * *

"Whether an act charged in an indictment is or is not a crime by the law which the Court administrates (in this case the statute law of the United States), is a question which has to be met at almost every stage of criminal proceedings. * * *

"The Court may err, but it has jurisdiction of the question. *Hab. corp.* refused."

The constitutionality of a statute under which a Court is called upon to decree the sale of land is a question to be determined by that Court, and its determination, whether right or wrong, cannot be questioned collaterally.

Florentine *vs.* Barton, 2 Wall., 216.

When a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached.

So, also, when a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised judicially,

that is, according to the course of the common law and proceedings in chancery, such judgment cannot be impeached collaterally.

Pulaski Co. *vs.* Stuart, 28 Grattan, 879.
Harvey *vs.* Tyler, 2 Wall., 328, 342.
Galpin *vs.* Page, 18 Wall., 350.

The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them that the subject matter was within the jurisdiction of the Court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceedings, either before the same court to set them aside, or in an appellate court.

Thompson *vs.* Tolmie, 2 Pet., 156.
And see Grignon *vs.* Astor, 2 How., 318.

In Voorhees *vs.* Bank of the United States, land had been sold under attachment proceedings, a branch of jurisdiction which was wholly statutory and superadded to the inherent common law jurisdiction of the Court. Several departures from the requisite procedure in such case and the omission of sundry statutory requirements appeared in the record; and, in a collateral proceeding, it was urged that these defects destroyed the jurisdiction of the original Court and rendered the sale void. The Supreme Court of the United States upheld the sale, notwithstanding these defects, and thus stated the principle upon which errors to be corrected by appeal are distinguished from facts which are fatal to the jurisdiction.

"A judgment or execution irreversible by a superior court cannot be declared a nullity by any authority of law; if it has been rendered by a court of competent jurisdiction of the parties, and the subject matter with authority to use the process it has

issued, it must remain the only test of the respective rights of the parties to it. * * *

The purchaser is not bound to look beyond the decree when executed by a conveyance, if the facts necessary to give jurisdiction appear on the face of the proceedings, or to look further back than the order of the Court. If the jurisdiction was improvidently exercised or in a manner not warranted by the evidence before it, it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the Court as an authority emanating from a competent jurisdicton."

Voorhees *v.* Bank of U. S., 10 Pet., 449, 473, 478.

" Finally there is another view of this case which is conclusive, as regards this and all other objections taken by the counsel to the validity of the sheriff's deed. It is the well known and established rule of law in Missouri and elsewhere, that a judicial sale and title acquired under the proceedings of a court of competent jurisdiction cannot be questioned collaterally, except in case of fraud, in which the purchaser was a participant (see Grignon *v.* Astor, 2 How., 319). The cases of Reed *v.* Austin, 9 Mo. R., 722; of Landes *v.* Perkins, 12 Mo., 239; Carson *v.* Walker, 16 Mo., 68, and Draper *v.* Bryson, 17 Mo., 71, show that this principle of the common law is the received and established doctrine of the courts of Missouri."

Griffith *et al. v.* Bogert *et al.*, 18 How., 158, 164.

III.

The surety Clarke was estopped from denying the jurisdiction of the equity court to enter the decree appointing him trustee and authorizing him to make sale of the property whether such decree is valid or invalid.

Inasmuch as the present suit is being prosecuted by the United States of America, the obligee of the bond, against the obligor, Waggaman, and the surety thereon, Clarke, to recover funds received by the obligor, Waggaman, under the decree of the equity court passed in 1899, it is quite clear that Waggaman is estopped and his surety Clarke is estopped from denying the jurisdiction of the court to enter the decree, no matter whether such decree is valid or invalid.

Opinion of Anderson, *J.*, Tr., pp. 45–47.

An obligor in a voluntary bond is estopped from disputing the validity of the bond.

Stephens *v.* Crawford, 1 Ga., 574; 44 Am. Dec., 680, 686.

Kincannon *v.* Carroll, 30 Am. Dec., 391.

The leading case upon this subject is that of Daniels *v.* Tearney, 102 U. S., 415.

In that case the convention of the State of Virginia just prior to the passage of its ordinance of secession passed an ordinance April 13, 1861, "to provide against the sacrifice of property to suspend proceedings in certain cases, whereby if a debtor against whom there was an execution in the hands of an officer offered bond and security of payment of debt, &c., when the operation of the ordinance should cease, his property shall be restored to him."

The party in this case against whom the execu-

tion was issued March 21st, of that year, availed himself of the provisions of the ordinance by giving the requisite bond and security. The judgment against him remaining unpaid and the ordinance having ceased to operate, suit was brought on the bond, and among other pleas, the defendant filed one to the effect that the statute and ordinance under which the bond was given "were in violation of and repugnant to the Constitution of the United States," and that "said statute was subsidiary to and in aid of and in furtherance of the objects and policy of an ordinance of secession passed theretofore by said convention."

In discussing the case the Court said: "As a statutory bond, therefore, the instrument is clearly void. Whether it is void also as a voluntary bond is a point upon which the opinions of all the members of the Court are not entirely in accord. We pass from the subject without further remark because, irrespective of that question, there is a view decisive of the case in regard to which we are unanimous, and our minds are free from doubt. Conceding the bond to have been wholly void in both aspects, it does not by any means follow that it could not thereafter under any circumstances be enforced as between the parties." * * *

"It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted that where a party has availed himself, for his benefit, of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applied with full force and conclusive effect."

Daniels *v.* Tearney, 102 U. S., 415, 421, and authorities cited.

The Court then quotes its own opinion in United States *v.* Hodson, in which it is said: "When a

bond is voluntarily entered into and the principal enjoys the benefits it was intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense."

In concluding its opinion, the Court uses this strong language: "Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice."

Daniels *v.* Tearney, 102 U. S., 422.

The obligor Stephens is the Sheriff of Baldwin County; as Sheriff he goes to the inferior court and suggesting that his previously executed bond was considered void by some, of his own mere motion tenders to them an additional bond which they accept. The act was voluntary. It does not appear that the Court, *virtute officii*, as agent of the State, considered the previous bond void, and directed a new one, or used any means by suggestion, threats or otherwise to get it. Now it does seem to me that it does not lie in the mouth of this obligor to object to the validity of this bond. He is estopped and so are his securities; for their assumption of the obligations of the bond was also voluntary, and they are his privies in law. What can they say against the breach of a contract thus intelligently, willingly and honestly made? Nothing. They must lie down under the burdens they have assumed.

Stephens *v.* Crawford, 44 Am. Dec., 680, 686; s. c., 1 Ga., 574.

Ploughman *vs.* Henderson, 59 Ala., 559, was the case of an administrator's bond in which the defendant sureties sought to impeach the validity of the administrator's appointment. The Court said:

"The present appellants are not in a position to inquire into and dispute the validity of the grant of

administration to A. W. Ploughman. The bond into which they voluntarily entered, and which is a matter of record in the Court of Probate, affirms the validity of the grant, and enabled the principal to gain access to the trust, assume its authority, and take possession of the assets of the deceased. Now that he has abused the authority with which they assented he was clothed, wasted the assets he received, and from his infidelity they, or those who relied on the bond as security, must be involved in loss, they cannot escape from liability by disputation of the fact that the bond affirms."

The jurisdiction of the Court in the appointment of an executor cannot be questioned by the surety on the executor's bond.

Moore *v.* Earle, 91 Cal., 632.

The defendant was not at liberty to dispute the appointment and official character of his principal in the bond. He was estopped from denying that he was the lawful guardian of the plaintiff.

Parker *v.* Campbell, 21 Texas, 763.

The validity of the appointment of the principal cannot be questioned by the surety.

Cutler *v.* Dickinson, 8 Pick., 386.
Williamson & McArthur *v.* Woolfe, 37 Ala., 298.
Norris *v.* State, 22 Ark., 524.
Burnett *v.* Henderson, 21 Texas, 588.
Coons *v.* People, 76 Ill., 383.
Bell *v.* People, 94 Ill., 230.

In debt in a prison-bounds bond, the defendant cannot show that the judgment recited in the bond, under which the prisoner was held, did not exist, and the plaintiff is not bound to produce any such judgment.

Allen *v.* Magruder, 3 Cr. C. C., 6.

So on an appeal bond, the existence of the judgment cannot be questioned.

Mix *v.* People, 86 Ill., 329.

In High on Receivers (4th Ed.), § 124, "it is said that, where the Court refuses a receiver upon condition of defendant executing a bond to account as receiver for all goods and money which had come into his hands, and pay them over pursuant to the decree of the Court, such a bond will be deemed good as a common law obligation, and the obligor, although not considered as a receiver or officer of the court, stands in the light of one who, for a personal accommodation, has assumed a legal responsibility, and after receiving the benefits of the obligation he is estopped from denying its legality."

Twin City Power Co. *vs.* Barrett, 126 Fed., 302, 309.

" F was illegally appointed tax collector of Marion County, and executed a bond for the faithful performance of his duties, in the form and with the conditions required by law for official bonds, took the oath and assumed the duties of the office, collected the taxes and failed to pay over the money, as required by law. *Held*, that he and his sureties are estopped, and cannot be heard to set up as a defense the illegality of his appointment. And although, by some strange omission, the statute did not require a tax-collector to execute a bond, yet if he execute the bond, collect the taxes and make default, he and his sureties are estopped, and cannot set up as a defense, that the bond was not required by the statute."

Taylor *v.* State, 51 Miss., 79.

" By signing his bond, they acknowledged his right to the office and to discharge its duties. * * * They, at least, shall not be heard to say that although they signed his bond, and thereby induced others to put money in his hands, relying on their

bond for its safety, still he was not * * * in fact a justice."

Green *v.* Wardwell, 17 Ill., 278; 63 Am. Dec., 366, 367.

"Where an officer of a municipal corporation gives his official bond with sureties, which bond recites that he has been appointed 'collector of assessments for street improvements,' with condition that 'he should well and truly pay to the treasurer of said city all moneys which he might collect or receive as such collector as aforesaid,' &c., the sureties are estopped from denying that such officer was *de facto* a collector of assessments for street improvements, and their liability to pay over what he has collected is co-extensive with his liability."

City of Hoboken *v.* Harrison, 30 N. J. Law, 73.

IV.

The bond is a valid common law obligation and as such binding upon the surety.

Even if the Conrt had been altogether without jurisdiction over the real estate the bond sued upon is a valid common law obligation, and enforcible as such.

Opinion of Anderson, *J.*, Tr., pp. 45–47.

In Dudley *v.* Rice, reported in 95 N. W. Rep., the sureties contented in the trial Court and on appeal that the bond in question having been given in compliance with the requirement of a court which had no jurisdiction in the matter, is void for all purposes.

In this case the Court held: A bond, although not good as a statutory bond because of a want of jurisdiction in the Court in the matter, may be good as a common law obligation.

Dudley *v.* Rice, 119 Wis., 97; s. c., 95, N. W. Rep., 936.
U. S. *v.* Tingey, 5 Pet., 115.
U. S. *v.* Bradley, 10 Pet., 343.
Twin City Power Co. *v.* Barrett, 126 Fed., 302 (C. C. A.).
McVey *v.* Peddie (Neb.), 96 N. W. Rep., 166.

A trustee receiving money from the sale of trust property must account for it regardless of the validity of the title by which the property was held.

Griffith *v.* Godey, 113 U. S., 89.

Where the proceeds of a partition sale of land resting in court for distribution are by agreement, which is not part of the partition suit, turned over to a trustee appointed, who gives a bond approved by the Court, made payable to the State, the Court has jurisdiction over the trust and authority to give effect to the bond, and the trustee and his sureties are liable for a violation of the trust.

State *ex rel.* Dair *v.* Roudebush, 16 N. E. Rep., 636.

The principal and sureties upon an undertaking in an appeal prosecuted, under a void statute, to a court to which in fact no lawful appeal lies, are liable on the instrument, if the Court, without objection, entertains the appeal, and upon a retrial of the issues renders a judgment adverse to the appellant.

" In this case the appellant obtained by his proceedings all that he stipulated for in the instrument in suit. He had a trial upon the merits in the District Court where a judgment was rendered in which all parties acquiesced, and during the pen-

dency of the proceedings he remained in possession and enjoyed the fruits of the demanded premises. The absence of jurisdiction in the District Court did not affect him injuriously, and whether the judgment which was there recovered was void or voidable, it was rendered at his instance, and he cannot justly be permitted to attack it collaterally in an action upon an undertaking by which he deliberately promised to respond in damages if it should be adverse to his desires."

McVey *v.* Peddie, 96 N. W. Rep., 167; citing Stevenson *v.* Morgan, 93 N. W. Rep., 180.

The Act of Congress of the 24th of Ap.. , 1816, provides: " That all officers of the pay, commissary and quartermaster's departments, shall previous to entering upon the duty of their respective offices, give good and sufficient bonds to the United States, fully to account for all moneys and public property which they may receive in such sums as the Secretary of War shall direct."

H became largely indebted to the United States for money advanced to him as paymaster; and suit was brought against the administrators of O, one of his sureties. The bond not having been in its very terms in conformity with the provisions of the law, the sureties claimed that they were not bound by it because of this variance; and because the United States had no right to take any other bond but that prescribed by statute. There is no solid distinction in the cases like the one before the Court between bonds and other deeds containing conditions, covenants or grants not *malum in se* but illegal at the common law; and those containing conditions, covenants or grants illegal by the express prohibition of statutes; in each case the bonds or other deeds are void, as to such conditions, covenants or grants which are illegal and are good as to all others which are legal and unexceptionable in their purport. The only exception is where the statute

has not confined its prohibition to the illegal conditions, covenants or grants, but has, expressly, or by necessary implication, voided the whole instrument to all intents and purposes.

A bond voluntarily given to the United States and not prescribed by law is a valid instrument upon the parties to it in point of law.

For a statute is strict law; but the common law doth decide according to common reason.

In the case of Maleverer *vs.* Redshaw, 1 Mod., 35, which was debt upon a bail bond, Mr. Justice Twisden says he had heard Lord Hobart say, "that the statute, *i. e.*, 23 Henry VI, Chapter 9, is like a tyrant; when he comes he makes all void. But the common law is like a nursing father, makes void only that part where the fault is and preserves the rest."

United States *v.* Bradley, 10 Pet., 343, 360-365.

When the statute required a bond to run in favor of the Commonwealth, and it was made to the Justices of the County Court, it was held good as a common law obligation.

Justice *v.* Smith, 2 J. J. Marsh, 418.

Johnson *v.* Laseire, 2 Ld. Raym., 1459, proceeded upon a bond of bail given by an executor, against whom a judgment had been rendered, which judgment was affirmed by the Appellate Court. Plea: That the statute requiring appeal bonds especially excepted executors from the necessity of giving such bonds. *Per emel* the bond was void in law. But,

Per curiam: If a man will voluntarily enter into such a recognizance 'tis good at common law. Judgment for plaintiff (1726).

The United States *v.* Mason, 2 Bond, 183, was a suit on the bond of a postmaster to recover the value of postage stamps entrusted to him for sale and not

accounted for. Defense, that the Postmaster-General had no right to deliver postage stamps to a postmaster without prepayment. *Held*, that the bond was good as a common law obligation, without regard to the statute, and that the surety was liable for the stamps.

Crawford *v.* Howard, 9 Georgia, 314, was the case of a bond given by the Sheriff of a county more than thirty days after his election, the delay operating by statute to render the office vacant. The bond, notwithstanding, accepted by the proper court and the Sheriff assumed the office. *Held*, good as a common law obligation and liable for the Sheriff's official negligence in permitting a prisoner to escape.

Voluntary bonds or those required as a condition of holding office, are valid, though not required or authorized by statute.

United States *v.* Tingen, 5 Peters, 115.
United States *v.* Phumpries, 11 App. D. C., 44.
United States *v.* Linn, 15 Peters, 290.
United States *v.* Bradley, 10 Peters, 343.
Tyler *v.* Hand, 7 How., 573.
Howgate *v.* United States, 3 App. D. C., 277.

There are of course cases, in which a bond may be impeached on the ground that it was exacted without authority and under duress of person or goods. But in these cases, it will be found that it is the duress that vitiates the obligation, and not the want of authority in the court.

In these and similar instances the objection to the bonds was the utter want of consideration, the levy being unlawful and the bond being given to prevent a mere trespass.

In the present case, there was no such duress. The defendants were not threatened with any danger to person or property, and their assumption of the obligation was dictated solely by hope of profit. If

it be conceded that the decree for sale was utterly void, that fact did not in the least menace them or operate as a motive for giving the bond. Bad as the decree may have been, it could do them no harm or afford them any inducement to enter into the obligation in suit. And however bad as a decree it may have been, it afforded them an opportunity of emolument of which they did not fail to take advantage.

"Where an appointment to office is irregular—is contrary to law and its policy—this does not absolve the person so appointed from the moral and legal obligation to account for public money which has been placed in his hands in consequence of such appointment."

United States *v.* Maurice, 2 Brock, 96; 26 Fed. Cases, Case No. 15747.

In the case just cited, holding the bondsmen liable, Chief Justice Marshall in the course of his opinion said: "The obligation to return it, as in every other case of money advanced by mistake, is one which, independent of all express contract, would be created by the law itself. So far as respects the receiver himself, he would be bound by law to return the money not disbursed, and if he would be so bound, why may not others be bound with him for his doing that which law and justice oblige him to do?"

"The fact that bonds are not prescribed by law does not necessarily invalidate them, although given by a public officer as security for the discharge of his duties, if they are not unlawfully exacted of him; if voluntarily given they are binding upon the parties to them."

City of Hoboken *v.* Harrison, 30 N. J. Law, 73, 74.

V.

Waggaman was trustee *de facto*, and the plea that his sureties are not bound because the Court was without jurisdiction to make sale of the property cannot be maintained because the Court had general jurisdiction in equity to appoint a trustee to receive and hold funds for the Court, and Waggaman's sureties are, therefore, liable upon his bond as trustee.

"The plea that the securities are not bound because their principal was not legally collector, and because much of the money collected as licenses and fines had not been legally assessed, cannot be maintained.

These questions cannot be raised in this collateral manner. It is a fact that the principal on the bond did act as collector, at least under color of authority, and that he did collect the licenses and fines imposed by those who were acting under color of authority. He must account for the moneys collected by him, even though unduly collected, and the sureties bound themselves to do so if he did not."

The Mayor and Selectmen of the Town of Homer *v.* Merritt, 27 La. Ann. (1875), 568.

County Cammissioners of Ramsey County *v.* Brisbin, 17 Minn., 451.

Case *v.* State, 69 Ind., 46.

Police Jury *v.* Haw, 2 La., 41 ; 20 Am. Dec. 294.

VI.

The judgment appealed from should be reversed.

On the foregoing facts, propositions of law and authorities, we ask that the judgment appealed from be, in all things, reversed.

Respecfully submitted,

Wm. Hepburn Russell,
W. H. Robeson,
Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 25.

THE UNITED STATES OF AMERICA TO THE USE OF MATTIE McC. HINE AND ROBERT E. HINE, PLAINTIFFS IN ERROR,

vs.

ALEXANDER PORTER MORSE AND OTHERS, EXECUTORS, DEFENDANTS IN ERROR.

BRIEF FOR THE DEFENDANTS IN ERROR.

Statement of the Case.

An action of debt was brought by the present plaintiffs in error, on March 5, 1906, in the Supreme Court of the District of Columbia, against Thomas E. Waggaman, as principal, and Daniel B. Clarke, his surety, of the will of which latter the present defendants in error are executors, upon a bond, in the penalty of $18,000, given by the said Waggaman to the United States, as chancery trustee in that court, for the sale of real estate in a cause wherein one of the usees of the action, Mattie McC. Hine, was complainant, and the other of them, Robert E. Hine, was a defendant, the declara-

tion alleging two distinct breaches of the condition of the obligation, and seeking to recover the proceeds of the sale, amounting to $8147.72, with interest on that sum from August 1, 1904, for the benefit of Mattie McC. and Robert E. Hine, the usees of the action (Rec., pp. 1-6), there being annexed to the declaration an affidavit from counsel in support of the action and of the recovery thus sought (Rec., pp. 6-9).

Against the principal and the surety summons was apparently issued and returned on March 5, 1906, the day on which the declaration was filed, but the return being that of *non est*, as to the principal (Rec., p. 9), no further proceedings were attempted against him, and the action was defended by the surety alone.

Each breach of condition assigned in the declaration was met by Clarke with a distinct plea as to the separate interest of each of the beneficial plaintiffs in the action; each plea incorporating into itself, in effect, the transcript of the proceeding in equity, wherein the bond had been given, and each plea being addressed, in connection with such transcript, to the invalidity, in effect, of the obligation, as one executed to accomplish an illegal object, by means of proceedings which the court in which they were conducted, was without jurisdiction to entertain.

As to the interest of Mrs. Mattie McC. Hine, in the penalty and condition of the bond, the surety, as to each breach, by further plea, set up his discharge, alleging, in effect, that, whereas, the condition of the instrument had, in effect, required the principal to bring the proceeds of the sale into the court of equity, to be there disposed of under the direction of the court, the said Mattie McC. Hine, upon the receipt by the principal of those proceeds, and for many years thereafter, had, nevertheless, without the knowledge or assent of the surety, by arrangement between herself and the principal, in fact entrusted the said proceeds to the hands of the said principal, without any return by him of them into court, upon his payment to her, and her receipt from him, of

interest upon the said proceeds at the rate of 5 per cent per annum, until the said proceeds, while so entrusted to the principal, had been lost by his bankruptcy (Rec., pp. 9-15).

In support of these pleas, there was filed on behalf of Clarke, an elaborate affidavit, denying the right of the plaintiffs to recover in the action, setting forth his defenses thereto, and explaining his innocent and unrewarded connection with the bond (Rec., pp. 15-18).

The 73d rule prescribed by the local Supreme Court, respecting affidavits, in actions *ex contractu*, was considered by this court in—

Fidelity & Deposit Co. *vs.* U. S., 187 U. S., 315.

On April 9, 1906 (Rec., pp. 43-44), the plaintiffs moved, in the former tribunal, for final judgment against Clarke, for "the want of a sufficient affidavit of defense," under that rule (Rec., pp. 45, 46, 59, 65-66), and, on May 26, 1906, the motion was granted, and judgment entered against the surety for the penalty of the bond, to be released on payment to the plaintiffs of $8,147.72, with interest from August 1, 1904 (Rec., p. 44), by direction of Mr. Justice Anderson, whose opinion accompanies the present record (Rec., pp 45-47).

On appeal by Clarke, to the Court of Appeals, this judgment, after his personal representatives had become parties thereto (Rec., p. 49), was, on May 7, 1907 (Rec., p. 49), reversed with costs, and the cause remanded for further proceedings, the opinion, upon such reversal, which is contained in the Record, being delivered by Mr. Justice McComas (Rec., pp. 59-69), a magistrate of much acquaintance with our local law and practice (30 App. D. C., XXV-XXVI).

The action being once more in the local Supreme Court, on November 8, 1907, the plaintiffs there demurred to the pleas (Rec., p. 50), the defendants joined in the demurrer

(Rec., pp. 51, 52), the local Supreme Court, upon the presentation of the mandate from the Court of Appeals (Rec., pp. 51-52), reversed the judgment it had rendered against Clarke on May 28, 1906 (Rec., p. 44), and overruled both the motion of April 9, 1906, upon which that judgment had been founded (Rec., pp. 43-44), and the demurrer of the plaintiffs, but with leave to the plaintiffs to plead over, and as they elected, in open court, to stand by their demurrer, entered judgment of *nil capiant* against them.

To that feature of this diverse action of the local Supreme Court, which overruled their motion of April 9, 1906, the plaintiffs, on November 8, 1907, formally excepted, and from the action of that court in general, appealed to the Court of Appeals.

But five days, thereafter, it was moved by the plaintiffs in the local Supreme Court, that its judgment of November 8, 1907, be vacated, and that they be suffered "to plead to the pleas," and, on November 25, 1907, the plaintiffs withdrew their appeal from the judgment of November 8, 1907, and their motion was by that court granted (Rec., p. 53).

In pursuance of the permission thus given them, the plaintiffs, on December 6, 1907, joined issue upon the pleas of discharge, in respect to the interest of Mrs. Hine, in the penalty and obligation of the bond and demurred to the residue of the pleas (Rec., pp. 53-54).

The defendants having joined in this new demurrer (Rec., p. 55), and the same being overruled, but the plaintiffs, in open court, electing to stand by it, and a second judgment of *nil capiant* being entered against them, the plaintiffs from this second judgment appealed to the Court of Appeals (Rec., p. 56), where the new judgment was affirmed, that court being of opinion, that the questions arising upon this second appeal, were but such, in effect, as had been determined by that court on the first (Rec., pp. 58-59).

The case is here on error to this last judgment of affirmance.

ARGUMENT.

To correctly appreciate the contentions raised by the pleadings, in respect to the bond thus litigated, it becomes necessary to investigate the object and course of the proceedings in which the instrument originated.

Robert B. Hine, a resident of the city of Washington, had died therein on June 27, 1895 (Rec., pp. 21, 31), seised in fee, of various pieces of valuable improved real estate situated in said city, and yielding rent, and amongst them lot 32, in a certain subdivision of square 164, known, with the dwelling thereon, as No. 1712 L street N. W., and had left a last will, duly executed for the purpose, whereby he devised, in effect, all of his realty to his widow, Mattie McC., for life, (expressly charging upon the life estate the cost of insurance and repairs), with vested remainder in fee, unto Robert Edward Hine, his only child, then but four years of age, and of whom the widow was mother (Rec., pp. 10, 19).

It was provided by this will, in effect, among other things, that, in the event of the death of the son, after the remarriage of his mother, the realty, upon her own decease should be sold, and the proceeds of sale distributed amongst certain designated lineal or collateral relations of the testator, and that, if the widow remarried, during the life of the son, she was to retain for her own use but one-half of the income of the estate, and pay over the residue to a trustee, for the use of the son (Rec., p. 19).

On March 6, 1899, while all of these pieces of real estate were still yielding rent, and held under no other rights

than those by the will created (Rec., p. 10), Mrs. Hine, to effect a sale of the L-street property, filed, *"in her own right"* (Rec., p. 21), in the local Supreme Court, her sworn bill in equity, against her son, Robert Edward, whom the bill alleged to be then but nine years of age, and against thirteen other persons, whom the bill alleged to be the lineal or collateral relations of the testator by his will intended, and the bill averred, that four of these thirteen persons, were infants, and that all of the thirteen, resided beyond this district, some of them in England, Australia or South Africa.

The bill alleged, in effect, that the complainant was still unmarried, and that, under the will of her deceased husband, she was tenant for life of the lot in question; that her son held therein a vested remainder in fee, with contingent limitations over in favor of his co-defendants; that the improvements upon the lot were deteriorating, for want of repairs, and the property at times without a tenant; that $8,500 could be obtained for the premises; that it would be better for the interests of all concerned for the property to be sold, and the proceeds invested, under section 973 of the Revised Statutes of the United States relating to this District, and that said will in no manner prohibited, but actually contemplated, a sale of the property.

And the bill prayed, in effect, amongst other things, for the appointment of a guardian *ad litem*, for the infant defendants; for a decree for the sale of the property *"by a trustee to be appointed for the purpose;"* for the investment of the proceeds of sale, under the section of the revision already mentioned; for payment of the income of the fund unto the complainant during her life, and the distribution of the principal after her decease, agreeably to the provisions of the will, which instrument, it was further prayed, might be proven and established by decree (Rec., pp. 10-11, 21-23).

1. *The grounds of relief set forth in the bill, disclosed the necessity for a receiver, but no justification, whatever, for a sale of the property.*

The most obvious requirements of justice, forbade the sale of the interests in remainder, for the discharge of a burden, thrown, not merely by the established principles of equity, but by the express terms of the will, upon the estate of the tenant for life.

Stansbury *vs.* Inglehart, 20 D. C. Rep., 134.

Upon the application of the remainderman, a court of equity will always appoint a receiver when the tenant for life refuses to keep up repairs.

Pike *vs.* Wassell, 94 U. S., 711, 715.

2. *The court possessed no jurisdiction of the case made by the bill and could render no valid decree under or in aid of the bill.*

(*a.*) No uncertainty exists in the principles established by this court, in respect to judgments, or decrees, rendered without, or in excess of, jurisdiction.

"The operation of every judgment must depend," says Mr. Chief Justice Marshall, "upon the power of the court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined."

Rose *vs.* Himely, 4 Cranch, 269.

Lessee of Hickey *et al. vs.* Stewart, 3 How., 762.

Reynolds *vs.* Stockton, 140 U. S., 264-265.

But "though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in

its modes of procedure and in the extent and character of its judgment."

Windsor *vs.* McVeigh, 93 U. S., 232.

And "though there be jurisdiction, for certain purposes, in a cause, the jurisdiction may be exceeded in the judgment."

Williams *et al. vs.* Berry *et al.*, 8 How., 542.
Bigelow *vs.* Forrest, 9 Wall., 351.
In re Frederick, 149 U. S., 76.
In re Bonner, 151 U. S., 256.

"Every act of a court beyond its jurisdiction, is void."

Ex parte Reed, 100 U. S., 23.
In re Mills, 135 U. S., 270.

"If a magistrate, having authority to fine for assault and battery, should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity, as if the preliminary jurisdiction to hear and determine had never existed."

Ex parte Reed, 100 U. S., 23.

"Why void? Because he had no power to render such a judgment."

Ex parte Lange, 18 Wall., 176.
In re Bonner, 151 U. S., 256-258.

And where the ultimate judgment is founded upon any order or process which the court was without authority to direct, the judgment itself is a nullity.

Lamaster *vs.* Keeler, 123 U. S., 376, 391.

Thus, it was held, that if the command in a writ of mandamus, "was, in whole, or in part, beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no

right to punish for any contempt of its unauthorized requirement."

Ex parte Rowland, 104 U. S., 612.
Ex parte Fisk, 113 U. S., 718.
Ex parte Terry, 128 U. S., 305.
Elliott vs. U. S., 23 App. D. C., 456, 466.

The question of jurisdiction is always examinable, collaterally.

In whatsoever country and tribunal, and under whatever circumstances, a right is asserted under a judgment or decree, the jurisdiction to render the judgment or decree, of the court which has awarded it, becomes the rightful subject of free and impartial inquiry.

Reynolds *vs.* Stockton, 140 U. S., 264-265.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct, or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them."

Elliott *et al. vs.* Piersol *et al.*, 1 Pet., 340.

The subsisting judgment of every tribunal, acting within the sphere of its jurisdiction, is admitted to be exempt from collateral attack.

"But directly the reverse of this is true, in its relation to the judgment of any court acting beyond the pale of its authority."

Wilcox *vs.* Jackson, 13 Pet., 511.

"This decision runs throughout all the cases on the subject, and it proves that the jurisdiction of any

court exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

Elliott *et al. vs.* Piersol *et al.*, 1 Pet., 340, 341.
Lessee of Hickey *et al. vs.* Stewart *et al.*, 3 How., 762.
Williams *et al. vs.* Berry, 8 How., 540-543.
Thompson *vs.* Whitman, 18 Wall., 467-468.
Kilbourn *vs.* Thompson, 103 U. S., 197-198.
Brown *vs.* Fletcher's Estate, 210 U. S., 82.

(*b.*) Jurisdiction upon the face of the bill, as to the rights of the infant defendants.

In the District of Columbia, the jurisdiction of equity to decree a sale of the estate of an infant in landed property is purely statutory, and this, in effect, had been twice adjudged by the general term of the local Supreme Court, and twice by the Court of Appeals, in volumes of reports printed and published several years before the filing of the bill in question.

Thaw *vs.* Ritchie,* 5 Mack., 200, 201-202 (an. 1886).
Stansbury *vs.* Inglehart, 20 D. C. Rep., 134 (an. 1891).
Trust Co. *vs.* Muse, 4 App. D. C., 12 (an. 1891).
Clark *vs.* Mathewson, 7 App. D. C., 382, 384 (an. 1896). And see, the *Appendix* hereunto.

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*In this decision participated Mr. Justice Merrick, who, though he had become a member of the local Supreme Court only a year before (4 Mack., III; 22 App. D. C., IV), had nevertheless, been one of the judges of the Circuit Court for this District, before the latter court was superseded by the former, through act of Congress of March 3, 1863 (12 Stat., 762).

Not that there existed in this district, in 1899, no statutory provisions for the sale of land belonging to an infant.*

By act of Maryland, 1798, ch. 101, sub. ch. 12, sec. 8 (Thomp. Dig., 19-20), for the maintenance and education of the infant, *the orphans' court*, with the approbation of the chancery court, might empower his guardian to sell real estate of the infant.

Thaw *vs.* Ritchie, 5 Mack., 200.
S. C. 136, U. S. 519.

And Congress, to the extent it deemed proper, had supplemented this legislation, by conferring jurisdiction upon

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*By Act of Maryland, 1773, ch. 7, sec. 1 (Thomp. Dig., 117) re-enacting, in part, 4 Geo. II, cap. 10 (Alex. Brit. Stat. in Md., 700; Bank U. S. *vs.* Beverley *et al.*, 1 How., 134, 150), sales or conveyances might be decreed or lands whereof an infant was seized or possessed, in trust or by mortgage, or where such lands were bound by contract to convey.

By Act of Maryland, 1785, ch. 72, sec. 5 (Thomp. Dig., 143), the jurisdiction of chancery was so enlarged as to empower it to decree the sale of real property descended or devised to an infant, where the intestate or testator had left insufficient personalty for the payment of his debts.

Bank U. S. *vs.* Ritchie, 8 Pet., 128, 143.
Bank U. S. *vs.* Beverley *et al.*, 1 How., 134, 150.
White *vs.* Joyce, 158 U. S., 128, 144.
Hansel *vs.* Chapman, 2 App. D. C., 361, 370.
Glenn *vs.* Sotheron, 4 Id., 123, 135.

And by Acts of Maryland of 1786, ch. 45, sec. 8 (Thomp. Dig., 182); 1794, ch. 60, sec. 8 (Thomp. Dig., 156), and 1797, ch. 114, sec. 5 (Thomp. Dig., 162).

Tolmie's Lessee *vs.* Thompson, 3 Cr. C. C., 123.
Thompson, &c., *vs.* Tolmie, &c., 2 Pet., 157, 165, 166.
Hastings *vs.* Granberry *et al.*, 3 Cr. C. C., 319.
Shaw *vs.* Shaw, 4 Cr. C. C., 715.

Aided by act Cong., Aug. 15, 1876 (19 Stat., 202), ample provision had been made for the partition, where practicable, and for the sale, where partition was impracticable, of land in which an infant possessed an undivided interest.

courts of equity, in this District, to decree the sale of real property belonging unto infants.

By act of Congress, March 3, 1843 (5 Stat., 621), carried into Rev. Stat. U. S., relating to this District, secs. 957-968, equity was empowered, at the suit of his guardian, but under very salutary provisions for the protection of the infant, to decree, in the first instance, a sale of the real estate of the infant, and to direct an investment, for his benefit, of the proceeds of sale.

And, by act of Congress, August 18, 1856 (11 Stat., 118), carried into Revised Statutes, United States, relating to this District, sections 969-973, our local Supreme Court might, upon bill filed, decree the sale of real estate, limited, by deed or will, to one or more, for life or lives, with contingent limitation over to such issue of one or more of the tenants for life as might be living at the time of the death of either of their parents, and the proceeds of any such sale were to be held under the control, and subject to the order, of the court, be invested under its supervision, and be deemed real estate, affected by the limitations contained in the deed, or will.

This last enactment was occasioned through the situation arising from the terms of the will of one John Gadsby, of this city.

Trust Company *vs.* Muse, 4 App. D. C., 12, 22.
District of Columbia *vs.* McBlair, 124 U. S., 320.

The bill in question was within the purview of none of these enactments.

Prior to the adoption of our present Code, which became operative on January 1, 1902 (31 Stat., 1189), there existed,

as shown by the course of local decision and the legislation above cited, no statutory authority in this District for the sale by a court of equity of a vested remainder in fee in lands belonging to an infant, at the suit and instance of the tenant for life, and that the estate of the infant, Robert Edward Hine, was a *vested* remainder, and that the suit was brought by the complainant, "*in her own right*" (Rec., p. 21), appeared upon the face of the bill.

The bill, it must be noticed, was not filed for the maintenance of the infant out of the proceeds of the sale of that particular interest in the property represented by his remainder. It was the prayer, in effect, of the bill (Rec., p. 23), that the entire title to the property be sold, the proceeds of such sale invested under sec. 973 of the Revised Statutes of the United States relating to this District, and the income of such proceeds paid unto the complainant for life.

And a sale, and the application of its proceeds, conformably to this prayer of the bill, must have left the infant, during the life of his mother, only in the precise situation, in point of law, which he would have occupied had no sale been directed.

By sec. 8 of act Cong., June 1, 1896 (29 Stat., 194), the mother, upon the decease of the father, was expressly made the natural guardian of their infant children, and the duty of parents to maintain, if not also to educate, such children, is accounted one of universal obligation (1 Bla. Com., 447; 2 Kent Com., 188), though in this District, a free and excellent system for the instruction of youth, has long prevailed.

The complainant, it is true, alleged in her bill (Rec., p. 22) that the sale thereby sought would "add to her income and enable her the *better* to provide for the remainderman, during his minority," but there is no suggestion, either in the bill, or in the evidence adduced thereunder, that the resources of the complainant, independently of her interest in

the particular property sought to be sold, were actually inadequate to the maintenance and comfort, both of herself and her son, according to their situations and prospects in life.

It is averred in the pleas (Rec., p. 10), and, hence, admitted by the demurrer, that the testator had died seised and possessed of "divers valuable pieces or parcels of improved real property," in this city, "yielding rent," and that he had "devised all of the said pieces or parcels of improved realty," unto his wife, for life, with vested remainder, in fee, to the son.

But if the local Supreme Court was, upon the case before it, without jurisdiction to decree the sale it directed, it was equally without power to determine whether the sale was expedient, or the reverse, such latter determination involving the *exercise* of jurisdiction.

Besides the defendant, Robert Edward Hine, the bill impleaded thirteen other persons, four of whom were infants, as the lineal or collateral relations of the testator contemplated in his will.

But before the adoption of our present Code, no court of equity, in this District, as shown by the course of local decision above cited, was possessed of authority to decree a sale, at the suit and instance of a tenant for life, of the contingent interests in land limited over, by will or deed, to individuals, whether infants or adults, who answered not to the description of *issue* of such tenant for life.

It would appear from the second prayer of the bill (Rec., pp. 23, 60) that the bill was brought under section 969 of the Revised Statutes of the United States, relating to this District, at the time the bill was filed.

But that section empowered the chancellor, as shown by the course of local decision above cited, to decree the sale of real property, only when the estate was limited to one or

more for life, or lives, with contingent limitations over to such *issue* of one or more of the tenants for life, as should be living at the death of either parent or parents.

And it appeared upon the face of the bill (Rec., p. 21) and also from testimony adduced in advance of the decree for sale (Rec., pp. 31-32) that none of the thirteen defendants impleaded as the beneficiaries of the contingent limitations contained in the will of the testator were in any wise related unto the complainant, except through affinity, and as being mother, brother, sister or nephew of her deceased husband.

It may be added, that, upon general principles of jurisprudence, it would seem impossible for a judicial tribunal to convert through any inherent power of its own, the contingent interests of adults, in realty, into contingent interests in personalty, at the suit of a tenant for life, without destroying that cardinal attribute of property reflected in the *jus disponendi*.

Over the rights of the defendants to the bill, the local court of first instance, was possessed, therefore, of no jurisdiction.

This elimination of defendants would leave the complainant as sole party to the controversy, if controversy could be then said to exist.

But the complainant could have no motive to obtain a decree for the sale merely of her own interest, of which she was free to dispose as her pleasure might direct; and, as courts of justice sit to adjudicate upon the rights, and not to indulge the caprices of suitors, no chancellor, worthy of his station, would have deemed himself authorized to entertain a bill filed by the complainant solely and exclusively for the sale of her own life estate in the property.

See Walter *vs.* Slater, 5 App. D. C., 357, 361-362.

It was held by Mr. Justice Anderson, in sustaining the motion for judgment against Clarke, for the supposed insufficiency of his affidavit of defense, that the equity court possessed "undoubted power" to direct a sale of this life interest, and hence, cannot be said to have proceeded "wholly without jurisdiction" (Rec., p. 47).

But the nature of the proceeding commenced by the bill, as well as the form of the decree for sale, were such as to contemplate a sale of the interests in the property of all the defendants to the bill.

The title to all of them, is, by the express terms of the decree for sale, devested from the parties, and (*horresco referens*), vested in the trustee, for the purpose of making the sale and conveyance. (Rec., pp. 33-34).

And it is averred, in the declaration filed in the action, that the bond given in the suit in equity, was executed "in accordance with the requirements of" the decree for sale, and that Waggaman "might be qualified to act, and should act, as trustee to make the sale." (Rec., p. 2.)

If the bond which the complainant in equity secured to be executed by the trustee and his surety, should be conceded to be valid, when viewed merely in relation to the sale of the interest of the complainant in the property, it could not thence follow that the instrument would be equally valid, when viewed in connection with the sale of other interests in the property over which the court possessed no jurisdiction.

But the validity or invalidity of the obligation cannot be determined in connection with the sale of the interest of the complainant only in the property.

The instrument must be weighed in connection with the nature of the sale it was actually intended to promote.

The condition of the obligation as to that sale is entire and indivisible, and the bond is avoided if any element in the condition be illegal.

Even though a contract be made upon divers considerations, each consideration goes to the entire contract, and the contract will be void if any of them be illegal.

1 Smith's Ld. Cas., 659 (9th Am. ed.).

Hazleton *vs.* Sheckells, 202 U. S., 71.

Nor, were it admitted, that the title acquired by the purchaser, to the life estate of Mrs. Hine, cannot now be questioned by that lady, can it, hence, follow, that his title must repose upon the jurisdiction of the court to decree a sale of that interest.

There could be nothing illegal or contrary to public policy, in the sale by the complainant of her life estate to the late Mr. Hay, and, if she procured such a sale to be made through an individual appointed at her request, in whom she had caused her title to be vested and who afterwards received the purchase money, such individual, though, through want of jurisdiction in the court which appointed him, no trustee, in law, *in the cause*, would still be deemed the agent and representative of the complainant, and she would be bound by his acts. But the surety in the bond of the *trustee*, would not, in the case supposed, become surety of the *agent*.

3. *Of the void proceedings taken against non-residents,* under the bill.

The infant son of the complainant, having been personally served with process, and the non-resident defendants returned *non sunt* (Rec., p. 24), the complainant, on April 26, 1899, obtained an order of publication against the non-residents, requiring their appearances to the suit, on or before the first rule day of the local Supreme Court, occurring forty days after the date of the order, which order provided, upon its face, for its publication "once a week, for three successive weeks," in The Washington Law Reporter and in The Evening Star.

The period thus designated for the appearances of the non-residents, was that prescribed both by Sec. 787 of the Revised Statutes of the United States, relating to this District, and by one of the rules in force in the local Supreme Court. (Rec., p. 62.)

The period which this order prescribed for its publication, was that demanded in the year 1899, by the like Rule of the same court. (Rec., p. 62.)

The order of April 26, 1899, had been procured from Mr. Justice Cox* (Rec., p. 24), who had then sat for 20 years in the Supreme Court of the District of Columbia (3 MacA., III), and who had, in 1886, delivered the opinion of that court, in Thaw *vs.* Ritchie, 5 Mack., 200.

The Rule already mentioned had further provided, in effect, that "the proof of publication" should be by the affidavit of the publisher, or manager, of the publishing paper; and that such affidavit should "state how many and at what times the order was published in the paper" (Rec., p. 62).

The affidavit of the manager of The Washington Law Reporter, filed on June 7, 1899, represented that the order had been published in that "*newspaper*, once a week for three consecutive weeks, as per certificate in the margin hereto" (Rec., p. 25), and the certificate in the margin, from the same manager, disclosed that the order had been published "in the regular issues of that weekly *newspaper*, bearing date April 27, May 4 and 11, 1899" (Rec., p. 26).

The affidavit of one of the publishers of The Evening Star, filed also on June 7, 1899, represented that the order had been published in that paper on April 29 and on May 6 and May 13, 1899 (Rec., p. 26).

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*A native of the District, admitted to the bar of *this* Court, at Dec. T., 1850 (10 How., VII), and a justice of the local Supreme Court, since 1879 (3 MacA., III).

In 1899, his combined experience in District law, had extended beyond the period of fifty years.

The order, instead of being published in both journals weekly, for the space of three weeks, or twenty-one days was, hence, published in neither, but weekly, for a period of fifteen days.*

The strictness of procedure required for affecting titles to real property under merely statutory methods, rendered it wholly unlawful to impair the rights of the absent defendants through such publications, and reduced to a nullity any decree rendered against those defendants.

Guaranty Trust Co. *vs.* Green Cove Railroad, 139 U. S., 137, 146-148.
Thatcher *vs.* Powell, 6 Wheat., 119.
Hunt *et als. vs.* Wickliffe, 2 Pet., 201.
Boswell's Lessee *vs.* Otis *et al.,* 9 How., 348.
Early *vs.* Dow, 16 *Id.,* 610.
Galpin *vs.* Page, 18 Wall., 350.
7 Robinson's Practice, 16-21, 86-99.

The decree *pro confesso* presently to be mentioned, opens, indeed, with a recital† of "it appearing to the court" that the order of publication "has been duly published * * * as therein directed" (Rec., pp. 27-28), but the court possessed no power to dispense with its own rules (Drew *vs.* Hogan, 26 D. C. App., 55, 66), and the recital, being the narration of a

*A similar disobedience is found (Rec., p. 37) of the publication directed by the order of ratification *nisi*, passed on July 20, 1899 (Rec., pp. 35-36).

Early *vs.* Doe, 16 How., 610.

In Leach *vs.* Burr, 17 App. D. C., 137, S. C., 188 U. S., 510, the order directing publication "twice a week for four weeks," had been completely observed, unless it could be held, that the term "week," must import a period commencing with Sunday and terminating with Saturday, a definition which was considered untenable.

†Recitals in instruments under seal, are to be noticed in another connection.

jurisdictional fact, cannot prevail against the truth as elsewhere disclosed in the proceeding in equity.

Settlemier *vs.* Sullivan, 97 U. S., 444, 448-449.
Cheely *vs.* Clayton, 110 *Id.*, 701, 708.
See, Ensminger *vs.* Powers, 108 *Id.*, 292, 301.

And although the record recites facts conferring jurisdiction, the truth of the facts thus recited, may be controverted even by oral evidence.

Brown *vs.* Fletcher's Estate, 210 U. S., 82, 88.

In the ordinary course of practice, the decree *pro confesso* would be prepared and presented to the court, by the solicitor of the complainant, and would be signed by the judge, without personal investigation of the accuracy of its recitals.

The order of publication of April 26, 1899, required the non-resident defendants to appear to the suit on or before the first rule day, occurring forty days after the date of the order, and the period for appearance thus designated, was, as we have seen, the period, in cases of publication in equity, prescribed by statute as well as by the rules of the Supreme Court of the District of Columbia.

Under the equity rules prevailing in that court, in the year 1899, the first Tuesdays of the months constituted the rule days of that court (Rec., pp. 62-63).

The first Tuesday fell, in the month of June of that year, on the first day of the month, and in the month of July of that year, on the fourth day of the month, which latter day was a legal holiday (Rec., p. 63).

As no more than thirty-six days could be reckoned from April 26 to and inclusive of June 1, the non-resident defendants were not required by the order of publication to appear to the suit before the fifth day of July, 1899, the entieth day after the date of the order (Rec., p. 63).

Nevertheless, the complainant, on June 7, 1899,* secured, for their want of previous appearance to the suit, a decree, *pro confesso*, against all of the adult non-resident defendants (Rec., pp. 27-28).

By this decree, if valid, the adult non-resident defendants became concluded upon all the averments of fact contained in the bill; and the cause as to these defendants, might proceed, as proceed it did, *ex parte*.

Thomson *vs.* Wooster, 114 U. S., 104, 110-114.
Alex. Ch. Pr., 30.
Rec., p. 63.

A judgment, or decree, rendered in advance of the period at which the court may lawfully acquire jurisdiction over the defendant, must, in the nature of things, be absolutely void.

Harris *vs.* Hardeman *et al.*, 14 How., 334.

To require a defendant to appear early in July, and to decree against him early in June, for default in his appearance, is wholly inconsistent with the conception of "*due process of law*," which imports "that there can be no proceeding against life, liberty, or property, which *may result in* the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Hagan *vs.* Reclamation District, 111 U. S., 701, 709.
Turpin *vs.* Lemon, 187 *Id.*, 51, 58.

Such a decree amounts, in effect, to a revocation of the order for appearance.

Windsor *vs.* McVeigh, 93 U. S., 274, 278.
Sturges *vs.* Hancock, 4 App. D. C., 289, 293.

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*Between April 26th and June 7th there elapsed but forty-one days, an interval not well calculated to enable persons residing in Australia and South Africa to obtain knowledge of the suit, and to employ counsel to appear thereto.

See Roller *vs.* Holly, 176 U. S., 398.

It is nothing to say that the final decree for sale was not made until July 6, 1899 (Rec., pp. 32, 33), the day after the adult defendants were by the order of publication required to appear.

For, assuming those defendants to have been on July 6, in default, for non-appearance, though a decree *pro confesso* might then have been taken against them, the equity rules in force in the Supreme Court of the District of Columbia, in the year 1899 (Rec., p. 63), prohibited the entry of any final decree against those defendants, prior to the rule day in August next.

O'Hara *vs.* McConnell *et al.*, 93 U. S., 150, 153.

But the final decree for sale expressly makes "absolute" (Rec., p. 33) the decree *pro confesso*, and reposes, as to the adult defendants, wholly upon the latter decree, and if the decree *pro confesso* against those defendants was void, so, also as to them, was the final decree.

Lamaster *vs.* Keeler, 133 U. S., 376, 391.
Ex parte Fisk, 113 U. S., 713, 718.
Ex parte Terry, 128 *Id.*, 289, 305.
Elliott *vs.* U. S., 23 App. D. C., 456, 466.

It had been one of the prayers of the bill, (Rec., p. 23,) "that a guardian *ad litem*" might be appointed for the infant defendants, and in the same paper in which the complainant obtained a decree *pro confesso* against the adult defendants, there was selected as the guardian *ad litem* of all of the non-resident infant defendants, one Thomas E. Waggaman (Rec., p. 28), who was later to become the Trustee for sale.

On June 8, 1899, the complainant secured the appointment of Waggaman as guardian *ad litem* also for her infant son, Robert Edward (Rec., p. 28).

On June 21, 1899, Waggaman, as guardian *ad litem* of all of the infant defendants, made answer, under oath, in

the usual form, to the bill (Rec., pp. 28-29), and *on the same day* the complainant not only filed a replication to the answer, and proved before an examiner the will of her testator (Rec., pp. 29-30), but also took the opinion of *Early* and *Lampton*, who were real estate agents, that the sale of the property for $8,500 would be "greatly" to the benefit of "*the* infant," as well as of all concerned (Rec., pp. 30-31).

What relations, if any, might exist, at this time, between these two witnesses, is not disclosed by the record in equity, but Early had previously found a purchaser for the property at the price mentioned in the bill, and ultimately received for his discovery, 3 per cent. of that price (Rec., p. 41).

To the testimony of these witnesses the complainant, on June 26, added her own:

> "The interest of all concerned would be promoted by a sale and an investment of the fund, *so that the fund would be always intact*" (Rec., p. 32).

On July 6, 1899, the complainant obtained from Mr. Justice Cole,* a decree, rendering absolute the decree *pro confesso* previously entered against the non-resident adults, and, in pursuance of the allegations and prayers of the bill, in effect, amongst other things:

1. Establishing the will of her testator.

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*He had then been for nearly seven years a member of the Supreme Court of the District of Columbia (21 D. C. Rep., V), and, before he became a Justice thereof, had been a practitioner before that court, for at least thirteen years (MacA. & M., 32, 33), and, for part of that time, as District Attorney of the United States (19 D. C. Rep., III.).

The extent of the jurisdiction of equity, in this District, to decree the sale of lands belonging to infants, had been defined, in decisions of the local Supreme Court, published while he was still at the bar, and in decisions of the local Court of Appeals, published prior to 1899, and after his accession to the bench.

It is not easy to suppose, either that he was ignorant of all of these decisions, or that, sitting as a judge of first instance, he would have intentionally defied them.

2. Decreeing the expediency of the sale and directing it to be made.

3. Appointing Waggaman trustee for sale, upon bond, with surety, unto the United States, in the penalty of $18,000, and with the usual condition, and authorizing him to sell for cash or upon time.

4. Requiring the trustee, upon the ratification of the sale by the court and payment of the purchase money, to make conveyance to the purchaser, *and to bring the proceeds of sale into court to be disposed of under the direction of the court.*

5. And vesting in the trustee, the title of all of the parties to the cause, to the end that he might make sale and conveyance to the purchaser.

This last provision of the decree seems to confound that distinction which has been universally understood to exist between *an estate* and a mere *power* operating upon it; and the object of the provision may not be apparent, in view of the particular provisions of section 793 of the Revised Statutes of the United States relating to this District at the time; and, under section 13 of the act of Maryland of 1785, chapter 72, the decree for sale, when ratified, itself operated as a conveyance.

Bank U. S. *vs.* Van Ness, 5 Cranch. C. C., 294.
Alex. Ch. Pr., 144, 153.
See Ayer *vs.* Murray, 105 U. S., 132.
Fall *vs.* Eastin, 215 *Id.*, 1, 11.

But this provision of the decree confirms the deduction that must be drawn from the nature of the proceedings in which the decree was rendered, that the object of the suit was to effect such a sale of the property as would embrace the interests therein of all the parties to the bill.

The extraordinary course of the proceedings in the suit in equity, hitherto delineated, must render it apparent, that

though they were conducted under the forms of law, there was no application of the judicial mind to those proceedings; that the complainant was enabled, from whatever cause, to procure such decrees and orders, however unlawful, as she desired, and that the proceedings are *res adjudicata* of nothing.

Graffan *vs.* Burgess, 117 U. S., 186.
Ensminger *vs.* Powers, 108 U. S., 301.
Jenkins *vs.* Robertson, 1 Law. Rep. Ho. L. (Scotch App.), 122.

The bill, and, with few exceptions, all of the steps taken under it, can be viewed no otherwise than as a succession, in effect, of impositions upon judicial authority.

And it is not in this tribunal that such impositions, whatever the forms they may have assumed, have ever been permitted to prevail.

Lord *vs.* Veazie, 8 How., 251, 255.
Cleveland *vs.* Chamberlain, 1 Black, 419, 425-426.
Wood Paper Co. *vs.* Heft, 8 Wall., 333, 336.
Johnson *vs.* Waters, 111 U. S., 640, 659.
Dakota County *vs.* Gledden, 113 *Id.*, 222, 225-226.
Tennessee, &c., R'd Co. *vs.* Southern Tel. Co., 125 *Id.*, 695.
Gardner *vs.* Goodyear Dental Vulcanite Co., 131 *Id.*, CIII.
Meyer *vs.* Pritchard, 131 *Id.*, CCIX.
Little *vs.* Powers, 134 *Id.*, 547, 557.
South Spring Gold Co. *vs.* Amador Gold Co., 145 *Id.*, 300.
Hadfield *vs.* King, 184 *Id.*, 162.

The decree for sale, except, perhaps, as to the particular provision thereof already mentioned, stood, upon its face, beyond the criticism of the nicest practitioner.

The complainant had prayed in her bill for the appointment both of a guardian *ad litem* for the infant defendants, and of a trustee to make sale of the property (Rec., p. 23) and both appointments had been conferred upon Waggaman, the prospective Trustee for sale.

The prayer of the bill, for the appointment of a trustee was necessarily a prayer, also, for his appointment, *agreeably to the established law of the local chancery*, and it was a cardinal feature of that law, that the trustee, before entering upon the discharge of his duties, should give bond, with surety, for fidelity in the performance of his trust.

The corollary thus drawn from the prayer of the bill, is recognized in the particular provisions for security, contained in the decree for sale subsequently procured by the complainant.

On July 7, 1899, Waggaman, as principal, and the late Dr. Clarke, as surety, executed unto the United States a bond in the penalty of $18,000, reciting that Waggaman had been *"duly appointed trustee to make sale"* of the real estate described in the proceedings, and conditioned, in effect, for the faithful performance of "the duties devolving upon him as such trustee," and for his correct obedience to "such order and decree" as the court should "make in the premises" (Rec., p. 34).

The bond of July 7, 1899, was, in form, unexceptionable.

The origin and motive of the connection of Clarke with the instrument cannot now with propriety be explained in the terms of his affidavit (Rec., pp. 15-16).

But the common experience of men with those circumstances under which private suretyships are usually secured might furnish a presumption as to that origin and motive, were more than the connection itself, now legally important.

The decree for sale, under which the bond was given, was valid on its face, and it can never be tolerated, that the apparently lawful and regular decree of one Federal tribunal

shall furnish in another no moral extenuation to individuals acting upon that decree, after the manner of Clarke.

Waggaman, on July 20, 1889, reported to the court an offer from the Honorable John Hay of $8,500, in cash, for the property, and that the premises had been, in fact, sold to Mr. Hay, subject to the ratification of the sale by the court (Rec., p. 35).

This sale was confirmed, *nisi*,* on the date last mentioned (Rec., pp. 35-36), and finally ratified† on August 22, 1899 (Rec., p. 37).

It is a matter of common knowledge, in which judges cannot affect to be ignorant, that, in all large cities of our country, men of prudence are commonly found to purchase real property, especially at judicial sales, which import no warranty, only upon the certificates of companies, incorporated for the examination and guaranty of titles.

Whether this precaution was observed, or omitted, by the late Secretary, does not appear from the record, but his willingness to purchase, for $8,500, in cash, a tenement in constant need of repair, yearly depreciating in value, "continually cracking," and whose "foundation" was "bad" (Rec., pp. 22, 30, 31, 32), would raise the presumption, were presumption material or admissible, that the purchase had been made with some object, which ought not to have been burdened by a title taken without any kind of collateral protection.

The exact time at which Waggaman received the proceeds of sale, is not disclosed, either in the proceedings in

*By Mr. Justice Bradley, who, although he had then been a member of the Supreme Court of the District of Columbia for but less than four months (18 D. C. Rep., V.), had, nevertheless, been engaged in practice before that court as early, at least, as 1874 (1 MacA., 270), and, in the course of a quarter of a century, must have acquired some considerable degree of familiarity with the local law.

†By Mr. Justice Clabaugh, who had come from Maryland to our local Supreme Court, on March 6, 1899 (22 D. C. App., IV.).

equity, or in the affidavit filed on behalf of the plaintiffs, in their action upon the bond.

The declaration fixes the date as that of July 19, 1899, (Rec., 4), which is, of course, erroneous, for the sale, at that date, had not yet been reported to the court (Rec., p. 35).

It was, perhaps, as alleged in the affidavit of Carke (Rec., p. 16), and deemed probable by the Court of Appeals (Rec., p. 63), shortly after the 22nd* day of August, 1899, the date of the final ratification of the sale, it was certainly before the end of that month in that year (Rec., p. 4:), that the proceeds of sale passed into the hands of the trustee.

No report or return of those proceeds, no acknowledgment of their receipt, no information whatever respecting them, was communicated by Waggaman unto the court, until about the middle of the month of May, 1905, more than five years and eight months after his acquisition of the fund (Rec., p. 63).

The explanation of this omission was to be furnished in the further progress of the proceedings in equity.

On February 16, 1905, Robert Edward Hine, the infant son of the complainant in the equity cause, therein, through Mr. Dixon, his next friend, and by counsel theretofore unknown to that cause, filed against Waggaman, a certain sworn petition, seeking to obtain against Waggaman, a rule declaratory, in effect, of the validity of the sale made under the decree of July 6, 1899, and in the nature of process for the enforcement of certain provisions of that decree.

The petition represented, in effect, amongst other things,

*By error, August 2, in the opinion of the Court of Appeals (Rec., p. 63).

that Waggaman, after his receipt of the proceeds of sale, had been, on September 26, 1904, adjudged a bankrupt; that it was "*important to the interests of the said Robert Edward Hine*" that Waggaman should state his account as trustee, discover the disposition he had made of the proceeds of sale, and, if necessary, bring the fund into court, for proper *preservation*, under its order.

A rule to these ends was prayed against Waggaman in the petition (Rec., pp. 38-39).

This petition, it is observable, was that of the infant, through *prochein ami*. No similar application to the court was made, at this time, by Mrs. Hine. Yet, that lady, if anyone, was solely entitled to the benefit of the fund, during her lifetime, and the enjoyment of the fund by her son, could commence only from her decease.

The solicitor of Mrs. Hine had been, until the filing of this petition, the only solicitor appearing of record in the equity cause, and from the proceedings in that cause, was affected, at that time, with knowledge, that no return or report of the proceeds of sale, had theretofore been made by Waggaman, as required by the decree for sale, and such knowledge on the part of the solicitor, was knowledge on the part of his client.

May *vs.* Le Claire, 11 Wall., 233.
Smith *vs.* Ayer, 101 U. S., 325-326.

Moreover, since the receipt by Waggaman of the proceeds of sale, interest thereon had been regularly paid by him to Mrs. Hine, down to August, 1904, the month next preceding his adjudication of bankruptcy.

The omission of Mrs. Hine, to unite in the application thus made by her son, or to seek similar relief, in her own right, can be attributed, with difficulty, to mere inadvertence, on the part either of herself, or her solicitor.

If any step was deemed necessary on behalf of the infant,

a due regard for his "interests" required the sale itself to be impeached by bill of review, or other proper proceeding.

Kingsbury *vs.* Buckner, 134 U. S., 650.

Stansbury *vs.* Inglehart, 20 D. C. Rep., 134.

In this court, the interests of an infant remainderman are not permitted to be sacrificed for the benefit of the tenant for life, even though no appeal be prosecuted on behalf of such remainderman.

Caldwell *vs.* Taggart *et al.*, 4 Pet., 190.

Waggaman had not been served with a copy of the rule awarded against him on February 16, 1905, until May 5, 1905 (Rec., p 39), and, on May 15, 1905 (Rec., p. 40), he answered the rule, under oath, and made full discovery.

In his answer Waggaman admitted, in effect, his appointment and qualification as trustee, and the final ratification of the sale on August 22, 1899; that he had received $8,500 in cash, as the proceeds of the sale; and that, after the payment of certain expenses, there had remained, in his hands, a net balance of $8,147.72, as shown in a certain account bearing date August 31, 1899, a copy of which account he had transmitted, on that date, to Mrs. Hine, and a further copy of which he annexed to his answer.

He represented, in effect, amongst other things, that Mrs. Hine was entitled to the income, for life, of the net proceeds of the sale of the land; that, on August 31, 1899, the date of the account, it had been agreed between Mrs. Hine and himself, that he should retain possession of the $8,147.72, and pay thereon, quarterly interest, unto that lady, at the rate of 5 per cent, per annum; that, under this arrangement, he had, in fact, retained possession of the fund until the time of his bankruptcy, and had paid such quarterly interest unto Mrs. Hine, down to the first day either of the month of May, or of the month of August, in the year 1904; that, at the time he entered into this arrangement with

Mrs. Hine, it had been, and he had then informed her that it was, his intention, to replace, with the fund in his hands, a particular loan, then secured upon specified real property in this city, but the loan had not thereafter been called in, and the fund had remained in his possession; that, at the time of such the arrangement between Mrs. Hine and himself, he was, as, at that time, he in good faith believed, entirely solvent; that he had so remained, as he believed, until the filing of petitions in bankruptcy against him, but that the adjudication of his insolvency had rendered it impossible for him to raise, or to pay into court, the money in question. (Rec., pp. 40-41.)

The title of the account thus mentioned in and annexed to the answer of Waggaman, is, in itself, such as to import his possession of the fund at the date of the account in some other quality than that of trustee in the suit in equity. (Rec., p. 64.)

The account is entitled

> "Thomas E. Waggaman, real estate broker, etc., in account with Thomas E. Waggaman, trustee.
> "Equity No. 20,225. Hines *v.* Hines."

And it exhibits a "balance for investment" of $8,147.72. (Rec., p. 41.)

The answer of Waggaman having admitted and asserted, upon the record, the loss of the trust fund while retained in his possession, under this arrangement with the beneficiary for life, no proceeding against Waggaman could directly result in the recovery of the fund, if the answer, which was not met by replication, must be taken as true.

And, after this answer, no further proceeding was had upon the particular petition filed, on behalf of the infant, on February 16, 1905.

New counsel, however, were again to intervene in the cause in equity, and there, through a double process, pursue the

object left unattained through the petition filed on February 16, 1905.

On November 14, 1905, six months (less ~~a single~~ two days) after the filing by Waggaman of his answer, separate unsworn motions were made, through counsel not previously connected with the controversy, for Robert Edward Hine, through his former next friend, and for his mother, in her own right, requesting the court, *upon consideration of that answer*, to require Waggaman, in effect, to pay into the registry of the court the sum of $8,147.72, by him in such answer acknowledged to be the balance due from him as trustee appointed by the court to make sale of the property. (Rec., pp. 41-42.)

The separate motions thus filed, were not only admissive of the several nature of the rights of the moving parties, but, in proper practice, involved, in effect, several decrees, and would prevent, therefore, the fate of either of the motions from becoming, of necessity, that also of the other.

On the day on which these motions were filed, service was acknowledged, on behalf of Waggaman, of notice that action upon the motions would be requested of the court, on November 17, or so soon thereafter as counsel might be heard.

This acknowledgment was subscribed by the same gentleman whose signature as counsel had been annexed to the bill filed by the complainant in 1899. (Rec., pp. 23, 42, 43.)

So far as appears from the record in equity, no further attention by this gentleman—no attention whatever by Waggaman—was given either to the motions or to the notice, and, on November 21, 1905, Mr. Justice Stafford, upon consideration of the two motions, and of the former answer of Waggaman, signed a decree, directing Waggaman, within ten days after service upon his solicitor of a copy of the decree, to pay into court the sum of $8,147.72, with legal interest from August 1, 1904 (Rec., p. 43).

Though service under this decree, is not affirmatively disclosed by the equity record (Rec., p. 43), it is alleged in the

declaration (Rec., p. 5), that such service was made upon the same solicitor of Waggaman who had acknowledged service of the notice of November 14, 1905 (Rec., pp. 42-43)—the gentleman whose signature as counsel had been annexed to the bill filed by Mrs. Hine, in 1899 (Rec., p. 23).

Several reflections arise upon this decree.

Though, as to the rights of Mrs. Hine, the disclosures made by Waggaman, under oath in his answer, were, or might become, if true, exceedingly injurious, no attempt was made by that lady to impeach their correctness, but "the answer" of Waggaman was made the sole foundation, both of the motions filed by herself and son, on November 14, 1905, and of the decree passed upon those motions seven days thereafter (Rec., pp. 41-43).

Neither party to a proceeding can rely upon one portion of a written instrument as evidence in his favor, without conceding to the other, the benefit of the residue of that instrument.

Greenleaf's Lessee *vs.* Birth, 5 Pet., 132, 135.

And if it appeared from the answer of Waggaman, that he acknowledged a balance to be due from himself, as trustee, it also appeared, from the answer, that it was not within his power to deposit that balance in the registry of the court, because of his bankruptcy, and the irretrievable loss of the fund.

Judges, as well as others, must recognize the limitations which physical laws impose upon human action; and the absence of all attempt to proceed against Waggaman, through process of contempt, for his disobedience, if any, of the decree of November 21, 1905, was, in effect, a concession that no man can be coerced into the performance of what has become, in his particular case, impossible.

And it can only be supposed, as held by the Court of Ap-

peals, that the decree "was designed to affect the right of Clarke, the surety on the bond" (Rec., p. 64).

That a court of justice may, in general, upon being advised of its want of jurisdiction over the controversy, at any time during its pendency, revoke its previous proceedings, and adjudge, to the person entitled, any fund still under its control, is not to be denied.

The motions filed on November 14, 1905, and the decree rendered upon those motions a week later, were filed and obtained by the same counsel who prosecuted an action upon the bond, in the name of the United States, "at the instance, and to the use, of" the persons on whose behalf those motions were filed.

Were the motions filed on November 14, 1905, for the deposit by Waggaman of the fund into the registry of the court, made with a view of rescinding the sale, and restoring the fund to the purchaser?

Was the decree obtained under those motions, on November 21, 1905, secured with the same view?

And, if judgment on the bond be finally entered against the defendants in error, is the recovery to be paid ~~upon~~ the purchaser?

No ingenuous mind could be expected to return an affirmative answer to any of these inquiries.

The action upon the bond was founded on the conclusiveness of the validity of the sale, as between the parties to the action, and upon the title of the equitable plaintiffs to the net proceeds of the sale.

If the Chancellor, as supposed by Mr. Justice Anderson (Rec., p. 47), was possessed of "undoubted power" to decree a sale of the interest of Mrs. Hine in the property, this circumstance could have no tendency to establish the validity of a bond conditioned for the sale of the title, *in solido*, to the property, embracing interests over which the Chancellor was without color of jurisdiction.

By the provisions of the decree for sale, obtained by that lady, Waggaman, upon the final ratification of the sale and the payment of the purchase money, was required to convey the property to the purchaser, in fee, "free, clear, and discharged of all claim of the parties to" the cause, and, in order that such sale and conveyance might be made, all of the parties were "devested" of their interests in the property, and such interests "vested" in Waggaman alone (Rec., pp. 33-34).

If the Chancellor possessed jurisdiction to decree the sale of the life estate of Mrs. Hine, it would follow, especially in view of these particular provisions of the decree, that the purchaser acquired her interest in the property, by title which no court could disturb, without his assent.

There could, then, be no vacation, *in invitum*, of the sale of the life estate, nor,—what in effect would be the same—any compulsion lawfully exerted against the purchaser to receive back so much of the purchase money as might be calculated to have been derived from the sale of that interest.

The motion of Mrs. Hine, at least, filed on November 14, 1905, as well as the decree of November 21, 1905, so far as such decree was founded upon the motion made by that lady, must be viewed in connection with these obvious principles.

It has, indeed, been supposed (Rec., p. 46), that notwithstanding the decree for sale be invalid, it is still the right of the Government to prosecute the bond, in order that the proceeds of sale may be refunded to the purchaser.

If the correctness of this proposition be admitted, the proposition itself can exert no influence upon the action involved upon the present writ of error.

That action, it has been shown, was not founded upon the nullity of the decree for sale, and was not instituted for the benefit of the purchaser.

It was grounded upon the conclusiveness of the decree for sale, as between the parties to the action, and for the recovery of the entire net proceeds of the sale, for the sole use and benefit of the equitable plaintiffs in the action.

Whether in a court of equity, competent to assemble, in a single proceeding, all of the parties in interest, the United States, as obligor, *in trust*, might, under any circumstances, enforce the bond for the benefit of the purchaser, as to so much of the purchase money as might be calculated to have been derived from the sale of the combined interests of the fourteen defendants to the bill, presents an inquiry of which the exigencies of the present controversy require no solution.

Such a suit upon the bond, by the United States, for the benefit of the purchaser, could be brought only at the instance of the purchaser, and could be sustained, if at all, only by averment and proof of his right to recover back some specific portion of the purchase money, representing the value of those interests, in the property, of which the court possessed no jurisdiction to decree the sale, and, at present, the entire net proceeds of the sale are claimed by the United States, suing "at the instance and to the use of" Mrs. Hine and her son.

It has already been observed, that, in view of the disclosures placed upon the record, as early as May 15, 1905, of the previous loss of the fund, the motions filed against Waggaman, on November 14, in that year, and the decree obtained upon those motions, can be supposed to have been designed, however ineffectually, merely to affect the rights of the surety in the bond (Rec., p. 64).

The decree of November 21, 1905, had been obtained only upon the motions filed but one week before, and upon consideration of the answer made by Waggaman to the rule awarded against him on February 16, 1905, under the petition filed, on the latter date, on behalf of the infant, to which answer, as already observed, no replication had been interposed (Rec., pp. 38, 39, 41-43).

The operation of every decree is to be restrained by the nature of the pleadings upon which it proceeds.

Barnes *vs.* Chicago R. R. Co., 122 U. S., 1.

And a decree beyond the pleadings, is void.
Reynolds v. Stockton, 140 U.S. 254.

And where a bill, petition or motion is heard only upon itself and the answer made thereto, it is manifest, either the whole of such answer must be taken as true, or the respondent must be disabled from establishing its truth.

3 Greenl. Ev., § 288.

Leeds *vs.* Marine Ins. Co., 2 Wheat., 380.

Banks *vs.* Manchester, 128 U. S., 244.

The principle of natural justice, no less than of equity practice, which, in such cases, assumes the truth of the entire answer, when the complainant refuses to put the answer in issue, did not cease to be applicable to the answer filed by Waggaman on ~~February 16,~~ May 15, 1905, from the circumstance that the motions made on November 24, 1905, were addressed to that answer, and the answer not technically addressed to the particular motions.

The chancellor was invoked to decree, and did actually decree, solely and peremptorily upon those motions and that answer, and unless the whole of that answer was to be taken as true, Waggaman was disabled from establishing its truth.

And the disability, in this connection, of the surety of Waggaman, was *a fortiori*.

The decree, then, of November 21, 1905, is, in effect, a decree upon motions admitting the truth of the averments contained in the answer made by Waggaman to the petition filed on February 16, 1905, on behalf of the infant.

The answer of Waggaman had set forth, amongst other things, in effect, that, by arrangement between Mrs. Hine and himself, the proceeds of sale, instead of being brought into court, for disposition, under its direction, agreeably to the requirements of the decree for sale, had, upon his payment unto that lady, of advantageous interest upon the fund, continued, by arrangement with the payee, for many years, in his hands, and been finally lost, through his bankruptcy (Rec., pp. 40-41).

These averments, if to be taken as true, disproved the existence of continued liability to Mrs. Hine, on the part of the surety, since they disclosed an executed arrangement to the prejudice of the surety, between that lady and the principal, under which the condition of the bond had become impossible of performance.

This impossibility was not less real, because the arrangement from which it resulted, was not merely illegal, but in contempt of judicial authority.

The surety assumes no moral obligation beyond such as flows from his contract.

United States *vs.* Price, 9 How., 83, 92.
Pickersgill *vs.* Lakens, 15 Wall., 140, 144.

And he possesses an interest in the terms, and even in the letter, of his contract.

Miller *vs.* Stewart, 9 Wheat., 680, 703.
McMichen *vs.* Webb *et al.*, 6 How., 292, 298.
Martin *et al. vs.* Thomas *et al.*, 24 *Id.*, 315, 317.
Smith *vs.* United States, 2 Wall., 219, 235.
U. S. *vs.* Boecker, 21 Wall., 652, 657.
U. S. *vs.* Ulrici, 111 U. S., 38, 42.

And he is discharged from obligation whenever, without his assent, and to his injury, the duties of the principal, as prescribed in the condition of the obligation, are subverted through concert and arrangement between the beneficiary and the principal.

That the rights of the *infant* would remain unaffected by the arrangement set up in the answer of Waggaman, as made between himself and Mrs. Hine, is, of course, freely conceded.

Will it be said, that the motions of November 14, 1905, and the decree rendered thereon, five days later, proceeded

only upon the particular admission made by Waggaman, in his answer, of a certain balance due from him as trustee, and excluded all consideration of any feature of that answer by which the effect of that admission became qualified or destroyed, either as to Mrs. Hine, or as to the surety in the bond?

An admission may, indeed, consist of several parts, differing in their evidential values, but as the true import of the admission can be collected only from the whole of its terms, the admission must be received and considered, if at all, in its entirety, and with all of the qualifications which limit, or even destroy, its effect.

1 Greenl. Ev. § 201.

> "This is a settled principle which has passed by its universality into a maxim of the law."
>
> Insurance Company *vs.* Newton, 22 Wall., 32, 35.

Clarke was no party to the decree of November 21, 1905, and could be affected thereby, if at all, only upon the theory that the decree was conclusive against the principal, and, therefore, binding upon the surety, as privy of the principal.

But the privity arising, under American law, between principal and surety, has never been supposed to exclude the surety from defenses which were personal to himself, and which, indeed, would cease to be such, if equally available to the principal.

The privity existing between Waggaman and Clarke was a privity measured by the obligations of the instrument which created it.

It was not a privity extending to any arrangement between Mrs. Hine and the principal, by which the condition of the bond might be rendered impossible of performance.

Upon the whole, the decree of November 21, 1905, passed solely upon consideration of the answer of Waggaman could establish no right against his surety, in favor of Mrs. Hine,

without subverting the condition of the bond, and depriving the surety of due process of law.

That decree, in the aspects in which it has thus far been considered, would stand, as already intimated, upon a different basis, as to the infant.

The legal operation of the decree of November 21, 1905, as between Mrs. Hine and the surety, must depend, then, upon the nature of the answer upon which it reposes.

But the legal operation, as between that lady and the surety, neither of this decree, nor of the decree for sale, is to be confounded with the matter of fact pleaded by the surety, by way of discharge, from obligation to Mrs. Hine, as to each of the decrees.

Each of these decrees the surety met, as to that lady, by one plea, relying upon the legal operation of the decree, by setting up the record of the suit in equity, and by another plea, relying upon special matter of fact, by way of release from the decree (Rec., pp. 12-14, 14-15).

The pleas of release have become, for present purposes, immaterial.

But the legal operation of the decree for sale, as between the plaintiffs in error and the defendants in error, and of the decree of November 21, 1905, as between Mrs. Hine and those defendants, is still before this court.

The breaches of the bond assigned in the declaration are, as will more fully appear hereafter, breaches by the trustee, of the decree for sale (Rec., pp. 2-4), and of the decree of November 21, 1905 (Rec., pp. 4-5), and for both breaches the *Norr.* seeks to recover.

That the liability of the surety for any breach of these decrees by his principal, must depend, in the first instance, upon the legal effect of the decrees, will not, perhaps, be denied.

The record of the equity cause in which these decrees were passed, was rendered by the surety, as will be subse-

quently explained, part of all such of his pleas as are now before this court (Rec., pp. 12, 14), and to these pleas the plaintiffs in the action demurred.

The demurrer, as it reaches back to the declaration, immediately, and in itself, raises the inquiry, whether the legal operation ascribed to the decrees, in the declaration, be such as was conferred upon them, under the course of proceedings disclosed by the equity record.

The decree of November 21, 1905, though, from circumstances known of record at its date, impossible of execution, is, in effect, not only a recognition of the validity of the decree for sale, but in the nature of process for its enforcement. And to the proceeds of sale involved in that decree, the beneficial plaintiffs in error assert exclusive title.

But the decree of November 21, 1905, can exert no influence upon the decree for sale, except upon the theory of ratification. And to say, that a court may be without jurisdiction to render a given decree, and possessed, at the same time, of authority to ratify that decree, is to assert contrary and repugnant propositions of law.*

For the decree of ratification, if valid, must itself operate by relation back to the time of the original decree.

Shriver's Lessee *vs.* Lyne *et al.*, 2 How., 43, 60.
Marsh *vs.* Fulton County, 10 Wall., 676.
Daviess County *vs.* Dickenson, 117 U. S., 657, 665.
Norton *vs.* Shelby County, 118 U. S., 425, 451.

And, as has appeared, if the judgment or decree be void, so must be the process for its enforcement.

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* Of course, if the surety had ceased, from whatever cause, to be liable, either to Mrs. Hine, or to her son, prior to the date of this decree, the decree was incompetent to revive that liability.

U. S. *vs.* Alexander, 110 U. S., 325, 328.

The local Supreme Court, if possessed of no jurisdiction to decree the sale, was equally without jurisdiction to direct the deposit of the proceeds of the sale in its registry, in order that they might be withdrawn therefrom by the present plaintiffs in error, or either of them. That court, after a sale made by its order, but without jurisdiction, could do no more than vacate the sale, and direct the return of the proceeds to the purchaser.

This last recourse was never in the mind either of mother or son. The sale was made in August, 1899; until August 1, 1904 (Rec., p. 43), the mother received interest on the proceeds of sale; the sale throughout the declaration is treated as a valid sale; and, in the nature of things, it could not be valid at a later period and a nullity at a former one.

Of the Theory of the Enforceability by Individuals of Bonds Executed to the State or Government.

In Maryland, the bonds of executors and administrators, of trustees for sale, in chancery, of testamentary trustees, and of guardians, and the bonds of inspectors of tobacco (Act Md., 1789, Ch. 26, Sec. 152, 2 Kilty, 2 Har. Ent., 442) of the collectors of taxes, or other revenue (Act Md., 1794, Ch. 53, Sec. 1, 2 Kilty), and of sheriffs (Act Md., 1794, Ch. 54, Sec. 8, 2 Kilty), were all made payable unto the State, and rendered enforceable in its name, for private uses, with the single view of securing some certain and permanent obligee to represent the very numerous individuals who might become interested in the performance of the conditions of those bonds, because liable to be affected by the defaults of such fiduciaries or officers.

Kinsted *vs.* The State, 1 Gill, 231.
3 Robinson's Practice, 351.

And see, generally—

Howard *vs.* The United States, 184 U. S., 676, 692-693.

But whenever a bond executed unto the State was sued in its name, at the instance and for the use of an individual, the breach assigned in the replication was invariably grounded upon legal injury to some certain and specific right or interest of that individual, which was set forth in the replication.

And the joinder was in traverse or avoidance of such replication.

2 Har. Ent., 343-344, 412-414, 439-441, 483, 593-595, 597-599.

It was said, in 1855, by the Court of Appeals of that State: "The party to whose use the suit is instituted is, in fact, regarded as the real plaintiff, although the State is technically so."

Ing *vs.* The State, 8 Maryland, 289, 295.

And see—

Maryland *vs.* Baltimore, 112 U. S., 490, 492.

It is still the law of Maryland, and of all well-ordered communities, with respect to every bond of the class now under consideration,

1. That the State possesses no pecuniary interest in the instrument.

2. That the bond can be put in suit only by some individual whose legal rights have been injuriously affected by a breach of the condition of the instrument.

3. That, in an action upon the bond, these rights must be specially set forth in the declaration, in order that the defendant may not only be afforded an opportunity of contesting them, but be protected, after judgment, against any subsequent proceeding, arising from the same cause of action.

4. That the person at whose instance the action is prosecuted may, if a non-resident, be like any other non-resident, required to give security for costs.

5. And that the attorney of the person at whose instance

the action may be prosecuted is entitled to receive the proceeds of the recovery.

Boteler *vs.* The State, 8 Gill & Johns, 359, 384, 386.
Ing. *vs.* The State, 8 Md., 289, 284.
Corner *vs.* The State, 8 Md., 348.
State *vs.* Layman, 46 Md., 190, 192.
Le Strange *vs.* The State, 58 Md., 26, 45, 46 (an. 1882), per Alvey, C. J.
Murfree, Off. Bonds, § 502.
Maryland *vs.* Baltimore, 112 U. S., 490.

But eight years after the assumption by Congress of the government of this District, it was established as a principle of this court, that, in suits upon such bonds, in the Federal tribunals, the citizenship of the actors must be deemed that of the individuals at whose instance and for whose benefit the suit is prosecuted.

Browne *et al. vs.* Strode, 5 Cranch, 303.

And a distinction has been here uniformly drawn, between suits of this description and those prosecuted by executors and trustees, and by assignors for the benefit of assignees.

Irvine *vs.* Lowry, 14 Pet., 293, 300.
McNutt *vs.* Bland *et al.*, 2 How., 9, 14.
Half *et al. vs.* Hutchinson, 14 How., 587.
Coal Company *vs.* Blatchford, 11 Wall., 172.
Knapp *vs.* Railroad Company, 20 Wall., 117, 123.
State of Florida *vs.* Anderson, 91 U. S., 667, 676, 677.
Walden *vs.* Skinner, 101 U. S., 577, 589.
New Hampshire *vs.* Louisiana, 108 U. S., 76, 89.

And it is the law of this tribunal that, where the United States institute a suit, or action, which really and substantially involves no interest of the Government, but merely the conflicting pretensions of private persons, the suit, or

action, becomes subject to the same bar of laches or limitation that would be applicable between individuals.

U. S. *vs.* Beebe, 127 U. S., 238, 347-348.
U. S. *vs.* Des Moines, &c., Co., 142 *Id.*, 510, 538.
Curtin *vs.* U. S., 149 *Id.*, 662, 674.
U. S. *vs.* Bell Telephone Co., 167 *Id.*, 224, 265.
French Republic *vs.* Saratoga Vichy Co., 191 *Id.*, 427, 438.

Of the Declaration upon the Bond.

The declaration describes the suit in equity no more particularly than one in which Mrs. Hine was complainant, and in which her son and others were defendants, and the object of her bill no more specifically, than one for procuring the sale of a certain parcel of real estate situate in this District, and mentioned and identified in the bill. (Rec., p. 2.)

It contains no averment of the rights or interest of those at whose instance and to whose use the action is brought, nor, indeed, of the rights or interests of any other persons.

Murfree Off. Bonds, §§ 502, 468, 463, 592.

Nowhere was it intimated in the declaration, or in the affidavit supporting it, that the bill was that of a tenant for life, charged with repairs, seeking, mainly, because of the expenses of repairs, to procure the sale of land, in which her infant son was seized of a vested remainder, in fee, and in which four other infants, and nine adults, none of either class being of her blood, were possessed of contingent interests.

The declaration alleged, in effect, that, in the suit in equity, there had been passed, on July 6, 1899, agreeably to the prayer of the bill, a decree ordering the sale of said parcel of real estate, appointing Waggaman trustee to make such sale, directing him to return the proceeds of sale into court, and requiring him to execute bond, with surety, unto

the United States, in the penalty of $18,000, conditioned for the faithful performance of the trust reposed in him by that decree, or by any further order, or decree, to be passed in the premises. (Rec., p. 2.)

It set forth, at large, the bond as well as the decree of November 21, 1905, alleged the due execution and approval of the bond, and averred that it had been executed *"in accordance with the requirements of the said decree"* of July 6, 1899, *"and to the end that the said Thomas E. Waggaman might be qualified to act, and should act, as trustee to sell the said real estate."* (Rec., p. 2.)

It alleged, in effect, that Waggaman, thereafter, "did undertake and assume, as such trustee, to sell the said real estate, *in pursuance of and in accordance with the authority and provisions of the said decree*" of July 6, 1899, *"and did as such trustee"* sell the property for a sum of money, whereof there remained in his hands a balance of $8,147.72. (Rec., p. 4.)

The declaration assigned, in effect, two breaches of the bond:

1. A breach of duty by the trustee, in omitting to pay the balance of the purchase money into the registry, agreeably to the decree of July 6, 1899. (Rec., p. 4.)

And, 2, a breach of duty by the trustee, in omitting to make such payment, agreeably to the decree of November 21, 1905. (Rec., pp. 4-5.)

Of the Pleas in the Action.

The action is prosecuted at the instance and for the use of individuals whose interests are not alleged in the declaration to be joint, but which are shown by the equity record to be several.

The petition filed, on February 16, 1905 (Rec., p. 38), on behalf of the son alone, and the motions made, on November

14, 1905 (Rec., pp. 41-42), severally on behalf of his mother and himself, recognized the existence of separate and distinct interests in the two claimants.

An estate for life, and a vested remainder, whether in real or personal property, form, indeed, for many purposes, an entirety, but each constitutes a distinct part, or portion, of that entirety.

2 Bl. Com., 164, 398.
2 Kent Com., 198, 352.

Each part, or portion, represents an actual estate, or interest, is attended by its own incidents, possesses its own value, and is susceptible of separate alienation.

4 Kent Com., 205.
Croxall *vs.* Shererd, 5 Wall., 268, 288.
Vicksburg, &c., Railroad Co. *vs.* Putnam, 118 U. S., 545, 554.

And may furnish, of course, the basis of a separate action.

1 Chitty Pl., 63, 132, 134, 139, 148, 175, 380 (14th Am. ed.).

There are, indeed, few, if any, instances, in which, upon common law principles, tenant for life and the remainderman, or reversioner, in real or personal property, can unite in a joint action respecting that property.

If, on March 5, 1906, any action might have been brought, in this District, upon the bond in question, in the name of the United States, for private benefit, separate actions might then have been so brought in respect of the separate interests of Mrs. Hine and of her son.

Had the bond been executed directly to Mrs. Hine and her son, *jointly*, the several nature of their interests in the penalty and condition of the bond, would, nevertheless, have entitled them, upon common law principles, to several actions upon the instrument.

Beckwith *vs.* Talbot, 95 U. S., 289, 292-293.

The several nature of the instrument actually in controversy, could not be altered, through the election of Mrs. Hine and her son to unite those interests in a single suit, in which the character of the legal plaintiff might render such joinder technically permissible.

And where the action is instituted in the name of the State, for the benefit of two individuals, it is obvious, that defenses may exist, as to the right of one of the beneficiaries, which would constitute no bar as to the interest of the other.

U. S. *vs.* O'Leary, 19 D. C. Rep., 118.

It is manifest, also, that a successful plea in bar, as to the right of one of the beneficiaries in the action, might be attended with consequences of great practical moment to the interest of the other.

If the United States be finally adjudged entitled, in the present litigation, to recover generaly, or, in other words, in right of both of the equitable plaintiffs, the personal representatives of the surety can can possess no legal interest or concern in the partition or division which those plaintiffs may make of the money, when recovered.

Those representatives might, indeed, continue liable upon the bond to such further actions as might be prosecuted in the name of the United States, for the benefit of any of the thirteen non-resident defendants named in the bill in equity.

The State *vs.* Wayman, 2 Gill & Johns, 254, 281.

But the solicitude of the personal representatives would be ended, as to their liability unto the usees of the present action, through the extinction of that liability, by payment, after judgment.

It is apparent, on the other hand, that if no recovery could be lawfully had, in the present litigation, in the interest of her infant son, the recovery, if any, in right of Mrs. Hine, could extend, not to the whole of the net balance of the proceeds of sale, but merely to the present money value of her

life estate in that balance, computed with reference to her age, sex, health and the like, and with reference to the contingency, if susceptible of calculation, (Dunbar *vs.* Dunbar, 190 U. S., 340) of her continued widowhood during the lifetime of her son.

And if no recovery could be lawfully had in the action, in right of Mrs. Hine, it must be equally manifest, that the recovery, if any, in the interest of her son, could not extend to the entire net balance of the proceeds of sale, but only to the present money value of his interest in that balance, computed under all of the provisions of the will affecting the calculation.

The separate interests of the equitable plaintiffs were, therefore, encountered by the surety with separate pleas.

The will of Robert B. Hine (Rec., p. 18) was proven in the suit in equity (Rec., p. 30), and a certified copy of the will was represented by the Examiner in that cause, as filed therein (Rec., p. 30), but no such copy appearing, in fact, in that cause, a copy of the will was introduced by the surety, in his pleas (Rec., pp. 10, 18), by way of *inducement* (Rec., p. 65).

The bill in equity, as has appeared, was described, in effect, in the declaration, merely as one filed by Mrs. Hine, as complainant, against her son and others, as defendants, to procure a decree for the sale of a certain parcel of real estate, situate in this District, and mentioned and identified in the bill.

And the affidavit filed in support of the Narr. did not improve this description (Rec., p. 7).

The bond itself, as well as each of the decrees which the declaration alleged to have been violated, turned, under the theory adopted by the surety, upon the true nature of the

cause to which they related, and the true nature of that cause depended upon the character and objects of the bill.

How was the true character of the bill, and of the proceedings thereunder, to be brought, by way of pleading, before the court for defensive purposes?

For the accomplishment of this object, there existed, no doubt, more than a single method.

The method selected by the surety, was to plead in confession and avoidance, as to each breach, and as to the separate interest of each of the equitable plaintiffs, and to render the transcript of the record in equity part of his pleas.

To the first breach assigned in the declaration, and by separate pleas to the interest of each of the equitable plaintiffs, the surety, *giving color*, said in effect:

The bill that is at large displayed in the transcript of the equity record, is the supposed bill mentioned in the declaration; the decree for sale, founded upon the allegations and prayers of the bill, so displayed, is the supposed decree mentioned in the declaration; and the bond given to accomplish the decree for sale obtained under the allegations and prayers of the bill, as so displayed, is the supposed bond mentioned in the declaration (Rec., 9-12).

To the second breach alleged in the declaration, the defendant by separate pleas to the interest of each of the equitable plaintiffs, *gave color*, and, in effect, averred:

The money mentioned in the supposed decree of November 21, 1905, was but the net proceeds derived from the property when sold under the supposed decree of July 6, 1899 set forth in the pleas to the first breach in the declaration assigned (Rec., p. 14).

The pleas to both breaches, concede an apparent right of action in the plaintiffs, upon the matter set up in the declara-

tion, but seek to counteract and avoid that apparent right of action, by appealing to the transcript of the record in equity, to show that the proceedings under the bill, were *coram non judice*, and that the bond executed to effect a sale of the property, was executed for the attainment of an unlawful object.

To these pleas, as already explained, the plaintiffs ultimately demurred, and the affirmance, in the Court of Appeals, of a judgment of the local Supreme Court overruling the demurrer, has resulted in the present writ of error.

To each of the breaches assigned in the declaration, the surety as to the interest of Mrs. Hine, pleaded also, in effect, *his discharge*.

But these latter pleas have been rendered immaterial by the judgment sustaining the others, on demurrer.

Clearwater *vs.* Meredith, 1 Wall., 25.

Of the Illegal Nature of the Bond.

"The claim which a man has to the protection which the State affords to his person and property, is denominated his Right of Action."

Gai. Com. 4, sec. 1, note *a*, p. 582 (Thomk. & Lem.).

The fundamental objection to the bond, is derived from the circumstance, that it was intended to accomplish, through the forms of law, an illegal devestiture of the interests of numerous persons in specific real property.

The enforcement by the State, at the suit of the obligee, of a bond he has procured for the subversion of the law of the State, is a participation by the State in the act of subversion.

And it is "the doctrine of this court, that a contract to do

an act forbidden by law, is void, and cannot be enforced in a court of justice."

Tiffany *vs.* Boatman's Institution, 18 Wall., 375, 384, 385.

Bement *vs.* National Harrow Co., 186 U. S., 70.

Cont'l Wall Paper Co. *vs.* Voight & Sons, 212 U. S., 227, 262.

All know and feel, that, unprovided by law with suitable assistants, our judges of first instance, however laborious, are incapable of personally investigating all of the circumstances determinative of the proper action to be taken upon every paper presented to the court for its signature.

Judges, in all populous communities of this country, are daily compelled to dispatch large masses of business, upon the assurance, express or implied, of counsel alone.

And the assurance of counsel is, in legal effect, that of the individual who employs him.

If parties who have succeeded in inducing an unsuspecting magistrate to violate his duty, and transcend his jurisdiction, may take and enforce even in the name of the sovereignty they have offended, obligations securing to those parties the fruits of such imposition, then is the protection of public policy thus far withdrawn from that system upon which, in the last deduction, the welfare of all organized society reposes.

It is vain to attempt an operative distinction between those who practice such impositions, in innocence, and such as may be guilty of them perversely.

The most unscrupulous offender will ever pretend to be innocent, and it must often be difficult to disprove the pretension. Each individual, even if unbred to the bar, is deemed to be acquainted with the law, and each is supposed to contemplate and design the natural and ordinary consequences of his conduct.

It was held by Mr. Justice Anderson, in directing judgment, in the local Supreme Court, against the surety, for the want of a sufficient affidavit of defense, that, even if the equity court "had been altogether without jurisdiction over the real estate, the bond sued upon is a valid common-law obligation and enforceable as such" (Rec., p. 47), and a like contention may here be expected from the plaintiffs in error.

But the objections to this position would seem to be insuperable.

1. The object as well as the terms of the bond, negative the intention of the surety to enter into a common-law obligation.

The surety was to be bound, if bound at all, not for a principal charged with common-law liabilities, but for the conduct of a trustee constantly amenable to the jurisdiction and control of a court of equity, administering the trust under the direction and practice of that tribunal, and reducing, through judicial supervision of the trustee, the practical liability to loss on the part of the surety.

Conant *vs.* Newton, 126 Mass., 105.

See

Powers *vs.* Chabot, 93 Cal., 266.

The surety, as has appeared, is deemed to have contracted no moral obligation beyond his contract.

And his legal obligation is always *strictissimi juris*, for he possesses an interest in the terms, and even in the letter, of his contract.

2. If the equity court was wholly without jurisdiction of the case made by the bill, that court was equally without jurisdiction to require, or to accept, a bond of any description, whatever, in aid of the relief sought by the bill; and

the condition of a bond thus required, or accepted, must, in legal reasoning, have been, *ab initio*, impossible of performance.

Bradley *vs.* Galt, 5 Mack., 317, 329.
Rec., p. 66, *ad calc.*

3. It is conceded by the defendants in error, that bonds when conditioned for lawful purposes, may in general be enforced, though not drawn in conformity with statute, and even when not by statute required.

But to say that an obligation which, from whatever cause, is rendered illegal, may, nevertheless, be valid and enforceable, as at common law, is not only to employ terms which are inconsistent with each other, but to deny to the common law itself a principal reason and object of its development.

The common law obligation which, even in their own right, the United States may enforce, must be a *valid* obligation.

U. S. *vs.* Linn *et al.*, 15 Pet., 311.
Tyler *vs.* Hand *et al.*, 7 How., 583.
U. S. *vs.* Hudson, 10 Wall., 408.
Jesup *vs.* U. S., 106 U. S., 152.

"It must not run counter to any statute; it must be neither *malum prohibitum* nor *malum in se*."
Moses *vs.* U. S., 166 U. S., 371, 386.
U. S. *vs.* Dieckerhoff, 202 U. S., 302, 309.

Nothing, therefore, is contributed to the argument, through the contention, or assumption, that the bond is a common law instrument.

The question must still remain whether the instrument constitute a *valid* obligation, for if the instrument be a nullity, it creates no obligation at all.

It may be inquired whether one who has fully enjoyed the benefit of an illegal written contract, is to be permitted

to retain that benefit, without any kind of accountability for the consideration upon which it proceeded?

The answer is, that the person receiving the benefit, will, in general, remain liable for the consideration upon which the benefit was bestowed, notwithstanding the illegality of the written contract, but that the remedy against him can never proceed directly upon such contract, but upon his implied promise, arising from principles of natural justice, and usually enforceable in assumpsit, or case.

Thomas *vs.* Railroad Company, 101 U. S., 71.

Central Transfer Co. *vs.* Pullman Car Co., 139 *Id.*, 24.

Union Pacific Ry. Co. *vs.* Chicago, &c., Ry. Co., 163 *Id.*, 564.

California Bank *vs.* Kennedy, 167 *Id.*, 362.

Concord First National Bank *vs.* Hawkins, 174 *Id.*, 364.

Louisville, &c., Ry. Co. *vs.* Louisville Trust Co., *Id.*, 552, 567.

De La Vergne Co. *vs.* German Savings Inst., 175 *Id.*, 40, 59.

Citizens National Bank *vs.* Appleton, 216 U. S., 196.

This principle applies not, of course, to sureties, who can, in general, be bound for the debt or default of others, only by writing.

But for the bankruptcy of Waggaman, the individual or individuals immediately entitled, might have recovered from him the proceeds of the sale, notwithstanding the nullity of all that occurred in the equity cause, including the bond and the sale, though the particular limitations contained in the will of Robert B. Hine, might possibly have suggested a court of equity, as the suitable forum for recovery.

Of the Estoppel of the Surety.

1. As to the recital in the bond.

It is held by Mr. Justice Anderson, in his opinion so often mentioned (Rec., p. 46), that it was "one of the express covenants of the bond" that Waggaman had BEEN DULY APPOINTED TRUSTEE to make the sale.

It is there further held that as Waggaman, in making the sale, "was *acting under the terms of this covenant,*" and as he received the proceeds of the sale both he and his surety were estopped to deny the jurisdiction of the chancellor to adjudge the sale to be made (Rec., p. 47).

But this recital in the bond, is but the recital of a conclusion of law.

3 Robinson's Practice, 530.
Dixon County *vs.* Field, 111 U. S., 83, 92.
Katzenberger *vs.* Aberdeen, 121 *Id.*, 171, 177.
Lake County *vs.* Graham, 130 *Id.*, 675, 681-682.

Whether a trustee for sale be by the court duly appointed in a given cause, must depend upon whether the jurisdiction of the court extended to that cause, and whether jurisdiction existed over the suit in which the bond now litigated was given, presents a question of law alone.

Questions which are judicial in their nature, cannot be excluded from the consideration of the judicial power, through recitals, by Congress, in their enactments.

United States *vs.* Claflin, 97 U. S., 546, 548-549.

Or by individuals, in their contracts.

In Tucker *et al. vs.* The State, 11 Md., 322, the appeal bond was held void, because the appeal had been taken to Anne Arundel county court, a tribunal not then in existence.

"It was said in argument, that the defendants are estopped by the recital in the bond, from denying that there was an Anne Arundel county court. * * * Whether a court exists or not is something more than a mere question of fact as to which parties may agree or be concluded by admissions. It must depend on the Constitution and laws, and when the court can see that the supposed tribunal is not known to these, it must so decide, no matter what the parties may have admitted by estoppel or agreement."

See, also, McCabe *vs.* Ward, 18 Md., 505.

2. That an individual is estopped, general, by his deed, must be universally conceded.

But the terms of this axiom embrace an estoppel by *deed*, not by an instrument wholly insufficient in law to answer the description of a deed.

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never passed."

Norton *vs.* Shelby County, 118 U. S., 425, 442.

Avoid deed is *no* deed, and can create no estoppel—

Whether the invalidity of the instrument arise from coverture, infancy, or insanity.

Merriam *vs.* B. C. & F. R. R. Co., 117 Mass., 241.

Pells *vs.* Webquish, 129 *Id.*, 469.

Mason *vs.* Mason, 140 *Id.*, 63.

Bugam *vs.* Fayerweather, 144 *Id.*, 48.

Bank of America *vs.* Banks, 101 U. S., 240, 247.

From want of authority in the obligor (as in the case of a corporation) to engage in the transaction.

Dixon Co. *vs.* Field, 111 U. S., 83.

Lake County *vs.* Graham, 130 *Id.*, 674.

California Bank *vs.* Kennedy, 165 *Id.*, 362, 367.

Lonesville and R. R. Co. *vs.* Louisville Trust Co., 174 *Id.*, 552, 567.

Everest & Strode on Estop., 195.

Or from any other cause whatever.
Bigelow Estop., 18, 349, 451, 352, 465*n* (5th ed.).
2 Herm. Estop., Secs. 599, 623.
Everest & Strode on Estop., 195.
3 Smith Ld. Cas., 2101 (9th Am. ed.).
7 Robinson's Pract., 919.
1 Brandt Sur. & Guar. Secs. 56-57.
Caffrey *vs.* Dudgeon, 3 La. Ann., 38.
Levy *vs.* Wise, 15 La. Ann., 38.

Between the estoppel of an individual by recitals contained in an instrument which is no deed, and by those contained in a judicial record which is no record, there exists no distinction in principle.

To the argument that no party to a record could question its recitals, it was answered by Marcy, J.:

"For what purpose does the defendant question the jurisdiction of the court? Solely to show that the proceedings and judgment are void, and, therefore, that the supposed record is not in truth a record." His Honor was of opinion that the defendant, unless allowed to do this, would be deprived of his rights, through sophistry, as he was told, in effect, by the plaintiff, "The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle."

Starbuck *vs.* Murray, 5 Wend., 156.
Harris *vs.* Hardeman *et al.*, 14 How., 334, 341.
7 Robinson's Practice, 111.

To enforce illegal contracts, through the doctrine of estoppel, by recital, is to abolish illegal contracts, for all remedial purposes.

Were the obligor to be invariably estopped from contradicting whatever is recited under his seal and signature, "every bond, however illegal the consideration, could be

placed beyond the reach of controversy by a simple recital in its condition. This cannot be. A mere recital in a bond cannot be made to operate by way of estoppel, so as to preclude the obligor from showing the instrument to be void. Avoiding the deed, avoids the estoppel."

Cadwell *vs.* Colgate, 7 Barb., 253, 256-257.
Thomas *vs.* Burnus, 23 Miss., 550.
Crum *vs.* Wilson, 61 *Id.*, 233.
Levy *vs.* Wise, 15 La. Ann., 38.
Hudson *vs.* Inhab. of Winslow, 35 N. J. Law (6 Vroome), 537.
Bigelow Estop., 369*n*.

If such be the law as to the obligor, it must be no less the law as to the obligee.

The estoppel, if any, when the deed is void, cannot arise, then, by virtue of the recitals contained in the instrument, but must depend upon other principles.

It may be admitted by the defendants in error, for the purposes of the present discussion, that a strong current of authority appears to prevail, in favor of the following propositions, with their stated qualifications:

1. If one, by means of a void proceeding, disturb another in the possession of his property, the latter is liable to no action upon the bond which he has executed to obtain restitution.

It would shock that sense of justice which must be felt by individuals as well as judges, if an owner who had been deprived of his property by process wholly void, should still be held answerable for its value, from the circumstance that he had resorted to the only permissible method of regaining his own.

Hence stipulations in admiralty, where the court is with-

out jurisdiction, are incapable of enforcement, and stand in place of the *res.*

The Fidelity, 16 Blatch., 569.
The Monte A., 12 Fed. Rep., 331.
The Berkely, 50 *Id.,* 920.

Bonds executed for the relief of void attachments, as they stand in place of the attachments, are themselves void, and cannot create estoppels.

Pacif. Nat. Bk. *vs.* Mixter, 124 U. S., 721.
Plant. Loan & Sav. Bk. *vs.* Berry, 91 Ga., 264.
First Nat'l Bk., &c., *vs.* La Due, 39 Minn., 416.
Cadwell *vs.* Colgate, 7 Barb., 253, 256-257.
Horman *vs.* Brinkerhoof, 1 Denio., 185.
Brokman *vs.* Hamill, 43 N. Y., 554.
Poole *vs.* Kermit, 59 *Id.,* 554.

And so, of forthcoming bonds.

Buckingham *vs.* Bailey, 4 Sm. *vs.* Marsh, 538.

2. If one, in a void proceeding, execute a bond whereunder he has become enabled to secure all the advantage attainable, had the proceeding been *coram judice*, he will, in an action upon the instrument, by an innocent obligee who has suffered from that advantage, be estopped from questioning the validity of the instrument.

This was the principle determined in Daniels *vs.* Tierney, 102 U. S., 415, discussed in the Opinion of the Court of Appeals, Rec., p. 68, where, in pursuance of a statute enacted in Virginia, on April 30, 1861, but which was adjudged "invalid, by reason of the treasonable motives and purposes by which its authors were animated in passing it" (p. 419), the sheriff withheld the levy of execution, upon bond from the defendant to the plaintiff, conditioned for the payment

of the debt, with interest and costs, whenever the operation of the statute should terminate.

And, where the conditions of the instruments have been neither illegal, in themselves, nor contrary to public policy, a similar principle of estoppel has been applied, in various instances, by the State tribunals,

To the bonds of executors and administrators.

McChord *vs.* Fisher, 13 B. Mon., 193.
Ploughman *vs.* Henderson, 59 Ala., 569.
Moore *vs.* Earle, 91 Cal., 632.

To the bonds of guardians.*

Corbitt *vs.* Caroll, 50 Ala., 315.

To appeal bonds.†

Robinson *vs.* Moody, 14 Ky. Law Rep., 202; Stevenson *vs.* Morgan, 93 N. W. Rep. (Nebraska), 180; McVey *vs.* Peddie, 96 *Id.* (Nebraska), 180 (where, however, the facts were peculiar); Butler *vs.* Wadley, 15 Ind., 502; Buckley *vs.* Stephens, 29 Ohio St., 620, 624.

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*Strong authorities are to be found, however, to the contrary. Conant *vs.* Newton, 126 Mass., 105; Ancion *vs.* Gillott, 10 La. Ann., 124; Thomas *vs.* Burris, 23 Miss., 550; Crum *vs.* *Wilson*, 61 *Id.*, 233.

†In some of the States the obligations of such bonds extend only to costs. Prescott *vs.* Bacon, 64 Iowa, 702; Stephens *vs.* Miller, 80 Ky., 47; Byrne *vs.* Peddell, 4 La. Ann., 3.

In Federal practice such bonds have been adjudged to be void, when the appeals were void. Steele *et al. vs.* Creeder *et al.*, 61 Fed. Rep., 481; Jabine *vs.* Oates, 115 *Id.*, 861, 862; Fulton *vs.* Fletcher, 12 App. D. C., 1, 13; or when taken without authority, or to the extent of the excess, when exacted with more rigorous provisions than by law prescribed. Bradley *vs.* Galt, 5 Mack, 317, 329; Kountze *vs.* Omaha Hotel Co., 107 U. S., 378; M. C. & L. M. Railway Co. *vs.* Swan, 111 U. S., 387.

To bonds for procuring attachments:

Cadwell *vs.* Colgate, 7 Barb., 253, 256-257; Germond *vs.* The People, 1 Hill, 343.

To those for obtaining injunctions:

Adams *vs.* Olive, 57 Ala., 249; Terra Haute, &c., R. R. *vs.* Peoria R. R., 81 Ill. App., 435; Robertson *vs.* Smith, 129 Ill., 427; Stevenson *vs.* Miller, 2 Litt (Ky.), 306, 310; Loomer *vs.* Brown, 16 Barb., 325, 330.

And to bonds for procuring the writ of replevin.

Walko *vs.* Walko, 64 Conn., 74; Fahnestock *vs.* Mendenhall, 77 Ill., 637.

Within the same principle have been deemed to fall the bonds of sheriffs, of tax collectors, and of town intendants, in certain cases.

The estoppel embraced in the second proposition, though adjudged, in many of the State decisions, in actions arising upon bonds, was nevertheless, rested wholly upon that principle of natural justice which forbids one individual to repudiate his acts and conduct, after another has innocently confided in them, and must be wronged by their disavowal.

But this principle, as it depends not upon contract, and much less upon written contract, would seem with great difficulty, to be applicable to the situation of a surety.

The case of Daniels *vs.* Tierney involved no right of a surety.

And it may be observed of that case, that, as there could be nothing illegal or contrary to public policy, in the execution by an individual of an obligation for the payment of a just indebtedness, the infirmity, if any, in the bond executed under the Virginia statute, would proceed only from the

postponement of payment until the expiration of that statute, and from the objects and purposes which that postponement had in view.

At the time of the institution of the action, the Virginia statute was no longer in force, and the action itself constituted an acceptance by the obligee of the instrument executed for his benefit. The illegal design of the obligor, without any participation in that design by the obligee, would seem to have been no more material, than is the illegal purpose on the part of a grantor, which is never permitted to invalidate his conveyance, even as to third persons, unless the grantee be also implicated in that purpose.

But the decision was rested in that case, upon the doctrine of estoppel, arising in favor of the innocent.

3. If, in a void proceeding, one give bond for the accomplishment of an unlawful object, the obligee who has participated in that object, can maintain no action upon the instrument.

For the discouragement of unlawful contracts, the law must refuse to enforce them, when the parties to them are equal participants in wrongdoing.

2 Smith's Ld. Cas., 668 (9th Am. ed.).
Craig *et al. vs.* State of Missouri, 4 Pet., 410.
Randall *vs.* Howard, 2 Black, 585, 588-589.
Wheeler *vs.* Sage, 1 Wall., 518, 530-531.
Higgins *vs.* McCrea, 116 U. S., 671, 684-685.

That the doctrine of estoppel is limited by this necessary principle, was distinctly admitted in Daniels vs. Tierney.

"If the parties," the court observe, "are in *pari delicto*, the law will help neither, but leaves them as it finds them" (102 U. S., 420).

Of the obligee in the bond it was said:

> "The creditor was not to be consulted. His assent was not required. The sheriff could proceed *in invitum*. The option to give the bond or not was with the debtor. The presence or absence of the creditor, and his assent or dissent, were alike immaterial. He was powerless in any event to control the result." (*Id.*, 419).

Again: "In the case at hand, the obligee must be considered as wholly innocent, because the contrary is not alleged, and it does not appear" (*Id.*, 421).

Was the bond executed in the cause in equity now under consideration, executed *in invitum*, as to the complainant in that cause?

And was that complainant "wholly innocent" both of the procurement of the bond and as to the objects and purposes which the instrument was intended to subserve?

Domina litis, she, under the prayers of her own bill, and for purposes of her own, *secured* the decree, requiring the trustee to give bond, *"with a surety, or sureties"* (Rec., p. 33), in the very form of the instrument now litigated.

And it is alleged in the declaration, it was "in accordance with" that requirement, (Rec., p. 2), that the bond in suit was executed.

The pleadings contain nothing to impugn the innocence, in fact, of Dr. Clarke, in becoming "a surety" under the provisions of the decree which the complainant had obtained, and here, as in Daniels *vs.* Tierney, *de non apparentibus et de non existentibus eadem est ratio.*

Is the surety, (if we may conceive him to survive in his personal representatives,) now, as between himself and the promoter of the obligation, to become the subject of estoppel?

Then, indeed, "the person supposed to be estopped, is the very person imposed upon."

Hayne *et al. vs.* Maltby, 3 Term. Rep., 438, 441.
Miller *vs.* Bagwell, 3 McCord, 429, 433-434.
1 Brandt Sur. & Guar., §§ 56-57.

The attitude of the surety in an illegal bond, can certainly be no worse than that of the individual who, for purposes of her own, promotes the creation of the instrument, and becomes, in effect, one of its obligees.

And assuming that Mrs. Hine and Dr. Clarke were *in pari delicto*, in respect to the obligation, the law, as has appeared, could assist neither of them.

..

Of the injury sustained, through the alleged breaches of the Bond, by Robert Edward Hine, the infant usee of the action.

The infant son of the complainant was, in contemplation of law, no party to the suit in equity, and his remainder in the property has never been devested.

By reason of what damage might he recover in the action against Clarke?

And if the infant receive payment in that action, (to which the purchaser is no party,) may he still bring ejectment for the land upon the decease of his mother?

Bigl. Estop., 605 (5th ed.).

The infant son of the complainant was, in contemplation of law, no party to the suit in equity, and his remainder has never been devested by the sale.

By reason of what damage to his estate, real or personal, may he recover upon the bond given in that suit?

Will it be said that the remainderman has already ratifi
the sale, by becoming one of the equitable plaintiffs in t
action, or, if not, that he may still ratify the sale, upon t
attainment of his majority?

That an individual may ratify a contract, by bringing
action upon it, is undoubted.

Robb *vs.* Ross, 155 U. S., 13.

But, if the infant remainderman, as an equitable plaint
in the action against the surety, stands in the attitude of
person *sui juris*, it cannot hence follow, that, by uniting
that action, the remainderman has ratified, or was compete
to ratify *the* sale, with respect to which the bond was e
ecuted.

That a conveyance of land made by an infant is voidal
only, and may be ratified or disaffirmed by the grantor, wh
he attains his majority, is unquestionable.

Irvine *vs.* Irvine, 9 Wall., 617.
MacGreal *vs.* Taylor, 167 U. S., 688.

And if the sale made by Waggaman of the interest of t
infant remainderman, constituted, under the law of agenc
a sale, in effect, of that interest, by the infant himself, t
right of the infant to ratify or to disaffirm the sale, upon h
attainment of majority, is not to be questioned.

But the sale in fact made by Waggaman was a sale ma
in pursuance of a decree pronounced by a court possessed
no jurisdiction over the cause in which the decree was e
tered, and the condition of the bond extends no further tha
to the duties of the trustee in that particular suit.

It was obviously beyond the power of the remainderma
to authorize a judicial tribunal to render a decree which

was without jurisdiction to make, and hence, at all times beyond his power, to ratify such a decree.

Marsh *vs.* Fulton County, 10 Wall., 676, 684;
Daviess County *vs.* Dickenson, 117 U. S., 657, 665, and
Norton *vs.* Shelby County, 118 U. S., 425;

already cited in another connection, establish the principle, that even as to individuals, one can ratify the act of another, only when he was competent to authorize it, in the first instance.

Upon the expiration of the life-estate, the remainderman will be entitled to his action of ejectment, and if the usual precautions were observed by the purchaser, the company which passed upon the title, will be liable.

JOHN SELDEN,
Counsel for the Defendants in Error.

APPENDIX.

When, in England, the alienation of real property became desirable, but was rendered impracticable, from the incapacity of some, or all, of the parties in interest, it was customary, until long after the adoption of the Constitution of the United States, to resort to Parliament for an enabling statute, and the enactment, when obtained, was deemed a method of private conveyance.

2 Bl. Com., 344-346.

2 Tho. Co. Litt., 604, note A (2d Am. ed.).

In the States of the Union, a like recourse to the legislature, as *parens patriæ*, has been of continuous occurrence.

Wilkinsons *vs.* Leland *et al.*, 2 Pet., 2.

Watkins *vs.* Holman *et al.*, 16 *Id.*, 25, 59.

Williamson *et al. vs.* Berry, 8 How., 495.

Florentine *vs.* Barton, 2 Wall., 210.

Stanley *vs.* Colt, 5 *Id.*, 119, 169-170.

Croxall *vs.* Shererd, *Id.*, 268, 285.

Lobrano *vs.* Nelligan, 7 *Id.*, 295,

Hoyt *vs.* Sprague, 103 U. S., 613, 634.

(Of this District and of the Territories, Congress is, of course, the Father. Insurance Co. *vs.* Bangs, 103 U. S., 435, 438.)

The titles of the private acts mentioned in the statutes of Kilty, would indicate, that, prior to her cession of 1791, there had arisen in Maryland, scarcely any difficulty relating to the title or transfer of land, which had not been repeatedly removed by application to the legislature, though the brevity

of the titles given to such of these enactments as specifically relate to sales, or conveyances, renders it impossible to affirm, what must, in many instances, be supposed, that the land of an infant was involved.

In Virginia, lands in which an infant was interested, were in 1778, as well as in 1781, authorized by the legislature to be sold, and other lands acquired with the proceeds of sale. (9 Hen. Stat., 573; 10 *Id.*, 469, 470.)

The act passed in the latter year, related to the sale of lands of which the father was tenant for life, with vested remainder, in fee, unto his infant children,* and the act recited that the sale could not be accomplished, "without the direction of the general assembly."

In the same State, the Legislature, in 1782, authorized the sale of land wherein an infant was interested, and the loan of the proceeds, at interest, upon landed security, approved by the court. (11 Hen. Stat., 147.)

For the sale of land belonging unto an infant, the Parliament, in England, and the Legislature, in general, in the States, is the source of authority.

Lord Hardwick said, in 1750: "There is no instance of the court's binding the inheritance of an infant by any discretionary act of the court."

> "As to things personal, and in the composition of debts, it has been done, but never as to the inheritance, for that would be taking on the court a legislative authority, doing that which is the subject of a private bill."
>
> Taylor *vs.* Phillips, 2 Ves. Sen., 23.

*Such, in substance, was the title set forth in the bill filed by Mrs. Hine, on March 6, 1899, in the local Supreme Court.

And no English chancellor, for more than a century thereafter, ever attempted to deal with the legal inheritance of an infant, without the authority of an act of parliament.

7 Robinson's Practice, 103.

In 1828, Sir Anthony Hart thus remarked: "I have known cases, where a small piece of land has been of such local importance to some manor in the neighborhood, that four times the value has been bid for it, but the court would not sanction a sale of infants' real estate, however clearly for his benefit."

He considers, that, in the case before him, the proper proceeding will be to let the subject "go to the master, to inquire whether any lease can be made, and, if not, whether it will be for the benefit of the minors, that an application should be made for an act of parliament."

1 Molloy, 525; 12 Cond. Eng. Ch.

In the States of the Union, the want of jurisdiction in a court of equity, to decree the sale of lands belonging to an infant, without the previous sanction of the legislature, has been conceded, by the great preponderance of authority.

2 Kent Com., 230, note d (11th ed.).

2 Ld. Cas. Eq., Pt. 2, p. 1504, (4th Am. ed.).

7 Robinson's Practice, 103.

3 Pom. Eq. Jur., § 1309 (3d ed.).

In Williamson *vs.* Berry, 8 How., 595, a construction was given by this court to certain private acts of the legislature of New York, for whose passage there could never have existed occasion, had equity possessed an inherent jurisdiction to decree the sale of lands belonging to an infant, and Mr. Justice Nelson, though dissenting from the conclusion reached by this court, admitted that no such jurisdiction

existed, but that the power of sale must be derived from the legislature, p. 556.*

Suydam *vs.* Williamson *et al.*, 20 How., 427.
Suydam *vs.* Williamson, 24 How., 427.
Williamson *vs.* Suydam, 6 Wall., 723.

Whether the equity jurisdiction of the Supreme Court of the District of Columbia be, like that of the Circuit Courts, such as was known to the English chancery, at the time of the adoption of our Constitution, (Waterman *vs.* Canal Louisiana Co., 215 U. S., 33,) or consist only in the equity powers which Congress, in exercising exclusive legislation over this District, has conferred upon that tribunal, the result, upon the present point of discussion, must be the same.

For the grant by Congress of jurisdiction in given cases, under particular conditions, implies a denial of jurisdiction, in other cases, and under different conditions.

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*The judicial tribunals of New York, having subsequently given to these acts a construction different from that placed upon the acts by this court, the decision of those tribunals was here followed.

UNITED STATES TO THE USE OF HINE *v.* MORSE AND OTHERS, EXECUTORS OF CLARKE.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 25. Argued November 1, 1910.—Decided November 28, 1910.

Even if the bill seeking a sale of infant's property for reinvestment does not clearly state a case within the authority of the court, the decree of sale, appointment of trustee and execution of his bond are not mere nullities subject to collateral attack.

The Supreme Court of the District of Columbia is one of general ju-

risdiction possessing all powers conferred on Circuit and District Courts of the United States—in fact, the usual powers incident to a court of equity at the date of the Revolution, not incompatible with the changed forms and principles of government or affected by subsequent legislation. *Clark* v. *Mathewson*, 7 App. D. C. 382.

The inherent power of a court of equity of general jurisdiction over the persons and estates of infants is very wide. Its errors in regard to a sale of real estate of infants are reversible by appellate procedure, but until so corrected its judgment is not a nullity.

The voluntary surety on the bond of a trustee in a proceeding to sell real estate is estopped to attack the validity of the decree appointing the trustee or of the bond.

Where the demurrer to one plea of the answer was overruled and plaintiff did not plead further, reversal of the judgment and sustaining the demurrer to that plea leaves the other pleas open to be dealt with by the court below.

This court only having before it the demurrer on one plea to the answer which was overruled below, it reverses the judgment and sustains the demurrer, and other pleas in defense remain at issue and this court will not consider them on this appeal.

31 App. D. C. 433, reversed.

THE facts, which involve the liability of a surety on a bond given for faithful performance of his duty by a trustee appointed to sell the interest of an infant in real estate, are stated in the opinion.

Mr. Wm. Hepburn Russell, with whom *Mr. W. H. Robeson* was on the brief, for plaintiffs in error:

The Supreme Court of the District having exercised jurisdiction over the subject-matter of the suit in which the bond was given, its determination of its own jurisdiction is, after this lapse of time, binding upon all persons before the court in that case as to all proceedings, including the trustee and his surety. *Florentine* v. *Barton*, 2 Wall. 210, 216; *Evers* v. *Watson*, 156 U. S. 527, 533; *State of Wisconsin* v. *Waupacca Bank*, 20 Wisconsin, 640.

The test of jurisdiction is whether the court had power to enter upon the inquiry; not whether its conclusion

was right or wrong. *Commissioners of Lake County* v. *Platt*, 79 Fed. Rep. 567; Brown on Jurisdiction, §§ 64, 65, 66.

The decree of sale under which the trustee Waggaman sold the property and acquired the funds for the security of which he gave the bond, cannot be collaterally questioned by his surety. *McCormick* v. *Sullivant*, 10 Wheat. 192; *Skillern's Exrs.* v. *May's Exrs.*, 6 Cranch, 267; *Clary* v. *Hoagland*, 6 California, 685; *Tallman* v. *McCarty*, 11 Wisconsin, 401; *Dugan* v. *City of Baltimore*, 70 Maryland, 1; *Ex parte Watkins*, 3 Pet. 191, 203, 209; *Florentine* v. *Barton*, 2 Wall. 216; *Ex parte Parks*, 93 U. S. 20; *Pulaski Co.* v. *Stuart*, 28 Grattan, 879; *Harvey* v. *Tyler*, 2 Wall. 328, 342; *Galpin* v. *Page*, 18 Wall. 350; *Thompson* v. *Tolmie*, 2 Pet. 156; *Grignon* v. *Astor*, 2 How. 318; *Voorhees* v. *Bank of United States*, 10 Pet. 449, 473, 478; *Griffith* v. *Bogert*, 18 How. 158, 164.

The surety Clarke was estopped from denying the jurisdiction of the equity court to enter the decree appointing the trustee and authorizing him to make sale of the property, whether such decree is valid or invalid. *Stephens* v. *Crawford*, 1 Georgia, 574; *Kincannon* v. *Carroll*, 30 Am. Dec. 391; *Ploughman* v. *Henderson*, 59 Alabama, 559.

The jurisdiction of the court in the appointment of an executor cannot be questioned by the surety on the executor's bond. *Moore* v. *Earle*, 91 California, 632; *Parker* v. *Campbell*, 21 Texas, 763; *Cutler* v. *Dickinson*, 8 Pick. 386; *Williamson & McArthur* v. *Woolfe*, 37 Alabama, 298; *Norris* v. *State*, 22 Arkansas, 524; *Burnett* v. *Henderson*, 21 Texas, 588; *Coons* v. *People*, 76 Illinois, 383; *Bell* v. *People*, 94 Illinois, 230; *Allen* v. *Magruder*, 3 Cr. C. C. 6; *Mix* v. *People*, 86 Illinois, 329; *Twin City Power Co.* v. *Barrett*, 126 Fed. Rep. 302, 309; *Taylor* v. *State*, 51 Mississippi, 79; *Green* v. *Wardwell*, 17 Illinois, 278; *Hoboken* v. *Harrison*, 30 N. J. Law, 73.

The bond is a valid common-law obligation and as such

binding upon the surety. *Dudley* v. *Rice*, 95 N. W. Rep. 936. A bond, although not good as a statutory bond because of a want of jurisdiction in the court in the matter, may be good as a common-law obligation. *Dudley* v. *Rice*, 119 Wisconsin, 97; *S. C.*, 95 N. W. Rep. 936; *United States* v. *Tingey*, 5 Pet. 115; *Twin City Power Co.* v. *Barrett*, 126 Fed. Rep. 302; *McVey* v. *Peddie* (Neb.), 96 N. W. Rep. 166; *Griffith* v. *Godey*, 113 U. S. 89; *Dair* v. *Roudebush*, 16 N. E. Rep. 636; *Maleverer* v. *Redshaw*, 1 Mod. 35; *United States* v. *Bradley*, 10 Pet. 343, 360–365; *Justice* v. *Smith*, 2 J. J. Marsh. 418.

Voluntary bonds or those required as a condition of holding office, are valid, though not required or authorized by statute. *United States* v. *Tingey*, 5 Pet. 115; *United States* v. *Phumpries*, 11 App. D. C. 44; *United States* v. *Linn*, 15 Pet. 290; *United States* v. *Bradley*, 10 Pet. 343; *Tyler* v. *Hand*, 7 How. 573; *Howgate* v. *United States*, 3 App. D. C. 277.

Waggaman was trustee *de facto;* the court had general jurisdiction in equity to appoint a trustee to receive and hold funds for the court, and his sureties are, therefore, liable upon his bond as trustee. *Town of Homer* v. *Merritt*, 27 La. Ann. 568; *Commissioners* v. *Brisbin*, 17 Minnesota, 451; *Case* v. *State*, 69 Indiana, 46; *Police Jury* v. *Haw*, 2 Louisiana, 41.

Mr. John Selden for defendants in error:

The grounds of relief set forth in the bill disclosed the necessity for a receiver, but no justification, whatever, for a sale of the property. *Stansbury* v. *Inglehart*, 20 D. C. Rep. 134; *Pike* v. *Wassell*, 94 U. S. 711, 715. The court possessed no jurisdiction of the case made by the bill and could render no valid decree under or in aid of the bill. *Rose* v. *Himely*, 4 Cranch, 269; *Hickey* v. *Stewart*, 3 How. 762; *Reynolds* v. *Stockton*, 140 U. S. 264–265; *Windsor* v. *McVeigh*, 93 U. S. 232; *Williams* v. *Berry*, 8

How. 542; *Bigelow* v. *Forrest*, 9 Wall. 351; *In re Frederick*, 149 U. S. 76; *In re Bonner*, 151 U. S. 256; *Ex parte Reed*, 100 U. S. 23; *In re Mills*, 135 U. S. 270; *Ex parte Lange*, 18 Wall. 176; *Lamaster* v. *Keeler*, 123 U. S. 376, 391; *Ex parte Rowland*, 104 U. S. 612; *Ex parte Fisk*, 113 U. S. 718; *Ex parte Terry*, 128 U. S. 305; *Elliott* v. *United States*, 23 App. D. C. 456, 466; *Elliott* v. *Piersol*, 1 Pet. 340; *Wilcox* v. *Jackson*, 13 Pet. 511; *Thompson* v. *Whitman*, 18 Wall. 467; *Kilbourn* v. *Thompson*, 103 U. S. 197; *Brown* v. *Fletcher's Estate*, 210 U. S. 82.

In the District of Columbia, the jurisdiction of equity to decree a sale of the estate of an infant in landed property is purely statutory. *Thaw* v. *Ritchie*, 5 Mack. 200, 201; *S. C.*, 136 U. S. 519; *Stansbury* v. *Inglehart*, 20 D. C. Rep. 134; *Trust Co.* v. *Muse*, 4 App. D. C. 12, 22; *Clark* v. *Mathewson*, 7 App. D. C. 382–384; *District of Columbia* v. *McBlair*, 124 U. S. 320.

The proceedings taken against non-residents under the bill were void.

The strictness of procedure required for affecting titles to real property under merely statutory methods rendered it wholly unlawful to impair the rights of the absent defendants through such publications, and reduced to a nullity any decree rendered against those defendants. *Guaranty Trust Co.* v. *Green Cove Railroad*, 139 U. S. 137, 146–148; *Thatcher* v. *Powell*, 6 Wheat. 119; *Hunt et als.* v. *Wickliffe*, 2 Pet. 201; *Boswell's Lessee* v. *Otis et al.*, 9 How. 348; *Early* v. *Dow*, 16 How. 610; *Galpin* v. *Page*, 18 Wall. 350; 7 Robinson's Practice, 16–21, 86–99; *Settlemier* v. *Sullivan*, 97 U. S. 444, 448–449; *Cheely* v. *Clayton*, 110 U. S. 701, 708. See also *Ensminger* v. *Powers*, 108 U. S. 292, 301; *Brown* v. *Fletcher's Estate*, 210 U. S. 82, 88; *Harris* v. *Hardeman*, 14 How. 334; *Hagar* v. *Reclamation District*, 111 U. S. 701, 709; *Turpin* v. *Lemon*, 187 U. S. 51, 58.

The extraordinary course of the proceedings in the suit

in equity show that even if conducted under the forms of law, they were not judicial and that complainant procured whatever decrees and orders that were desired; such proceedings are *res judicata* of nothing. *Graffan* v. *Burgess*, 117 U. S. 186; *Ensminger* v. *Powers*, 108 U. S. 301; *Jenkins* v. *Robertson*, 1 Law Rep. Ho. L. (Scotch App.) 122.

The bill, and, with few exceptions, all of the steps taken under it, can be viewed no otherwise than as a succession, in effect, of impositions upon judicial authority.

And it is not in this tribunal that such impositions, whatever the forms they may have assumed, have ever been permitted to prevail. *Lord* v. *Veazie*, 8 How. 251, 255; *Cleveland* v. *Chamberlain*, 1 Black, 419, 425–426; *Wood Paper Co.* v. *Heft*, 8 Wall. 333, 336; *Johnson* v. *Waters*, 111 U. S. 640, 659; *Dakota County* v. *Gledden*, 113 U. S. 222, 225–226; *Tennessee &c. R. R. Co.* v. *Southern Tel. Co.*, 125 U. S. 695; *Gardner* v. *Goodyear Dental Vulcanite Co.*, 131 U. S. ciii; *Meyer* v. *Pritchard*, 131 U. S. ccix; *Little* v. *Powers*, 134 U. S. 547, 557; *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *Hadfield* v. *King*, 184 U. S. 162.

There was no existence of continued liability to the beneficiary on the part of the surety, as there was an executed arrangement to the prejudice of the surety, between beneficiary and the principal, under which the condition of the bond had become impossible of performance.

The surety assumes no moral obligation beyond such as flows from his contract. *United States* v. *Price*, 9 How. 83, 92; *Pickersgill* v. *Lakens*, 15 Wall. 140, 144.

And he possesses an interest in the terms, and even in the letter, of his contract. *Miller* v. *Stewart*, 9 Wheat. 680, 703; *McMichen* v. *Webb et al.*, 6 How. 292, 298; *Martin et al.* v. *Thomas et al.*, 24 How. 315, 317; *Smith* v. *United States*, 2 Wall. 219, 235; *United States* v. *Boecker*, 21 Wall. 652, 657; *United States* v. *Ulrici*, 111 U. S. 38, 42.

The common-law obligation which, even in their own

right, the United States may enforce, must be a valid obligation. *United States* v. *Linn*, 15 Pet. 311; *Tyler* v. *Hand*, 7 How. 583; *United States* v. *Hudson*, 10 Wall. 408; *Jesup* v. *United States*, 106 U. S. 152; *Moses* v. *United States*, 166 U. S. 371, 386; *United States* v. *Dieckerhoff*, 202 U. S. 302, 309.

There is no estoppel. A mere recital in a bond cannot be made to operate by way of estoppel, so as to preclude the obligor from showing the instrument to be void. *Cadwell* v. *Colgate*, 7 Barb. 253, 256–257; *Thomas* v. *Burnus*, 23 Mississippi, 550; *Crum* v. *Wilson*, 61 Mississippi, 233; *Levy* v. *Wise*, 15 La. Ann. 38; *Hudson* v. *Inhab. of Winslow*, 35 N. J. Law (6 Vroom), 537; Bigelow, Estop. 369*n*; *The Fidelity*, 16 Blatch. 569; *The Monte A.*, 12 Fed. Rep. 331; *The Berkely*, 50 Fed. Rep. 920.

Bonds executed for the relief of void attachments, as they stand in place of the attachments, are themselves void, and cannot create estoppels. *Pacif. Nat. Bk.* v. *Mixter*, 124 U. S. 721; *Plant. Loan & Sav. Bk.* v. *Berry*, 91 Georgia, 264; *First Nat. Bk. &c.* v. *La Due*, 39 Minnesota, 416; *Cadwell* v. *Colgate*, 7 Barb. 253, 256–257; *Horman* v. *Brinkerhoof*, 1 Denio, 185; *Brokman* v. *Hamill*, 43 N. Y. 554; *Poole* v. *Kermit*, 59 N. Y. 554; *Buckingham* v. *Bailey*, 4 Sm. & Marsh. 538.

If, in a void proceeding, one give bond for the accomplishment of an unlawful object, the obligee who has participated in that object, can maintain no action upon the instrument. 2 Smith's Ld. Cas. (9th Am. ed.) 668; *Craig* v. *Missouri*, 4 Pet. 410; *Randall* v. *Howard*, 2 Black, 585, 588–589; *Wheeler* v. *Sage*, 1 Wall. 518, 530–531; *Higgins* v. *McCrea*, 116 U. S. 671, 684–685; *Daniels* v. *Tearney*, 102 U. S. 415.

Mr. Justice Lurton delivered the opinion of the court.

This was an action upon a bond executed by Thomas E.

Waggaman, as principal, and Daniel B. Clarke, as his surety. The bond was in these words and figures:

"In the Supreme Court of the District of Columbia.

In Equity. No. 20225, Docket 46.

Mattie Mc.C. Hine
vs.
Robert Edward Hine et al.

"Know all men by these presents, that we, Thomas E. Waggaman, principal, and Daniel B. Clarke, surety, all of the District of Columbia, acknowledge ourselves indebted to the United States of America in the penal sum of eighteen thousand dollars, for the payment of which we bind ourselves and every of our heirs, executors and administrators, jointly and severally, for and in the whole. Sealed with our seals, and dated this 7th day of July A. D. 1899.

"Whereas the said Thomas E. Waggaman has been duly appointed trustee to make sale of the real estate in the proceedings in this cause mentioned.

"Now the condition of the above obligation is such, that if the above bounden Thomas E. Waggaman shall well and truly discharge the duties devolving upon him as such trustee and shall in all things obey such order and decree as this court shall make in the premises, then the above obligation to be void and of no effect; else to be in full force and virtue."

The bond, as shown by its recitals, was executed in a pending equity cause in the Supreme Court of the District, wherein the parties for whose use this suit is brought were parties, either plaintiff or defendant.

The declaration, in substance, averred a breach of the bond, in this: That Waggaman had assumed the duty and function of trustee for the sale directed by the decree, had sold and conveyed the property as directed, but had not accounted for the proceeds, having unfaithfully vio-

lated the trust and confidence reposed in him by squandering and misappropriating such proceeds. It was further averred that on November 21, 1905, the said Waggaman had disobeyed a decree of the court, requiring him to pay into court the sum of $8,147.27, with interest from August 1, 1904, and was therefore in default.

The defenses with which we are concerned upon this writ are those made by the surety, who, by a plea which the court below sustained, challenged the obligation of the bond. The insistence is that the Supreme Court of the District exceeded its authority in decreeing a sale of the land which was sold by Waggaman, and his appointment to make such a sale was a nullity, and the bond executed by him with the defendant Clarke as surety mere waste paper.

The proceeding in the Supreme Court in which this bond was executed was a bill in equity to sell lot No. 1912 I street N. W., Washington, D. C., as the property of a minor for purpose of reinvestment under like trusts. The title was held under the will of Robert B. Hine, who died in 1895. So much of the will as concerns the title to the premises of which a sale was decreed was in these words:

"I give and bequeath to my dear wife, Mattie McC. Hine, a life interest in all my real estate. As executrix she will collect the income arising from said real estate, and after paying all necessary expenses of collection, fire insurance and repairs, shall retain the remainder of the income for her own use. After the death of my said wife, I give and bequeath my real estate to my son, Robert Edward, and any other children that may hereafter be born to me. If my said wife should marry again, she will from the date of such remarriage, be entitled to retain for her own use, one-half of the net income of my estate, and will pay the remainder to a trustee for my son, and any other children who may hereafter be borne to me. Provided, further, that should my wife marry

again, and should no child of mine by her, be then surviving, the whole net income from my estate shall be retained by her, during her life, and after her death, my real estate shall be sold, and of the proceeds, one-third shall be paid to my father, the Rev. Henry Hine now of Boston Spa. Yorkshire England, if he then be living, he not being then living to my mother Amelia Burnett Hine, neither of them being then living to my sister, Amelia Burnett Hine, and the residue, shall be equally divided between my brothers and sisters share and share alike. If neither parent, nor my sister Amelia Burnett Hine outlives my said wife, then the whole net proceeds of the sale of my real estate, shall be equally divided, between my brothers and sisters. Should any of these have died, before this distribution takes place, their surviving children shall receive the share of the deceased parent, share and share alike."

The complainant in the suit was Mattie McC. Hine, the widow of the testator, who averred that she had never remarried. The defendants were the only issue of her marriage with testator, her son Robert E. Hine, then an infant of nine years of age, and the persons who, under the will, were given contingent interests. The minor Robert E. Hine was duly served and answered by guardian *ad litem*. The other defendants were made parties by publication, as persons not to be found in the District. The bill alleged that the dwelling-house was deteriorating in value, that it was often unrented, that repairs, insurance and taxes left an inconsiderable net income, which would go on diminishing. That she believed she could obtain $8,500 for the premises, a sum much larger than the value of the property to the remaindermen when her estate should fall in, and that the proceeds could be so invested as to much improve her income and better "enable her to provide for the remainderman during his minority." The bill alleged that the will did not

prohibit a sale. The prayer was for a decree of sale and for a reinvestment, in pursuance of § 973, Rev. Stat. D. C.

Upon the pleadings and proof the court directed a sale of the said lot, and in the same decree appointed Thomas E. Waggaman "trustee to make the sale," requiring him to execute a bond with surety "conditioned for the faithful performance of the trust reposed in him by this decree, or which may be reposed in him by any future order or decree in the premises." By the same decree he was required "to bring into court the money arising on such sale . . . to be disposed of under the direction of the court," etc.

The contention is that the Supreme Court of the District has no inherent or general power as a court of equity to decree the sale of an infant's property for the purpose of reinvestment, and that its jurisdiction was wholly dependent upon statutory power conferred by §§ 969 *et seq.*, Rev. Stat. D. C., taken from the act of Congress of August 18, 1856. Section 969 reads as follows:

"Where real estate is limited by deed or will to one or more for life or lives, with a contingent limitation over to such issue of one or more of the tenants for life as shall be living at the death of their parent or parents, and the deed or will does not prohibit a sale, the Supreme Court of the District may, upon the application of the tenants for life, and if the court shall be of the opinion that it is expedient to do so, order a sale of such estate, and decree to the purchaser an absolute and complete title in fee simple."

The contention is that the only jurisdiction conferred by this statute is confined to real estate which is by deed or will "limited to one or more lives, with a contingent limitation over to such issue of one or more of the tenants for life as shall be living at the death of either parent," and that under the will of Robert B. Hine the devise to Robert Edward Hine is a vested and not a contingent

remainder, while the contingent remainders—contingent on the death of said Robert and the subsequent remarriage of his mother, the said Mattie—are not limitations over to issue of either Robert B. Hine or Mattie Hine. For this construction of the statute the court below relied upon *Trust Co.* v. *Muse*, 4 App. D. C. 12, 20; *Thaw* v. *Ritchie*, 5 Mack. 200, and *Clark* v. *Mathewson*, 7 App. D. C. 384.

Clearly under the will there was a life tenant and a remainder over at the death of the life tenant to Robert E. Hine, who was the issue of the testator and of the life tenant. The remainder was not absolute, for if the remainderman should die, and his mother, the life tenant, remarry, this lot was to be sold and the proceeds paid over to certain collaterals named. Technically the interest was a vested remainder, subject to open and let in the testator's brothers and sisters and to be divested upon the death of Robert E. Hine and remarriage of the life tenant. The contention now is that if the court erred in the construction of the will, or in the interpretation and application of the statute, and decreed a sale for reinvestment, not strictly authorized by the statute, that its action and decree is to be regarded as a nullity, that the sale is void, and that the appointment of Waggaman as trustee and the execution of his bond are absolute nullities.

But if we assume that upon a critical construction of the will and of the statute the bill seeking a sale of this property for reinvestment did not state a case clearly within the statutory authority of the court, it does not necessarily follow that the decree of sale and all else that occurred are to be treated as mere nullities, subject to collateral attacks such as this is.

The Supreme Court of the District is one of general jurisdiction. It possesses all of the powers which by statute are conferred upon the Circuit and District Courts of the United States. Sections 760 and 765, Rev. Stat.

D. C. It may be said, indeed, to have the usual powers incident to a court of equity at the date of the Revolution, not incompatible with the changed form and principles of government or affected by subsequent legislation. *Clark* v. *Mathewson*, 7 App. D. C. 382.

The inherent power of a court of equity over the persons and estates of infants is very wide. For the purpose of maintenance, the power over real estate is undoubtedly more comprehensive than it is over the sale of real estate for purposes of reinvestment, though manifestly for the interest of the minor. The weight of authority seems to be that it does not extend to sales merely because it shall appear to be for the interest of the infant (Bispham's Equity, § 549; Story's Equity, § 1357; 3 Pomeroy Equity, §§ 1304, 1309), though there is not lacking very respectable authority for the power to sell real estate when shown to be for the manifest interest of the minor. 2 Kent's Comm., 11th ed., * 230; 5 Johns. Ch. 167; 4 Heisk. (Tenn.) 370, and 7 Baxt. (Tenn.) 502. The Supreme Court of the District had jurisdiction over the subject-matter, the *res*. It had jurisdiction over the parties. It was, according to due course of equity proceeding, called upon to examine the will and the statute which gave the power to make the sale in certain circumstances. If then jurisdiction consists in the power to hear and determine, as has so many times been said, and the court errs in holding that a case has been made either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction and that its decrees are absolute nullities? To this we cannot consent. If the court was one of general and not special jurisdiction, if under its inherent power, supplemented by statutory enlargement, it had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particular application was within or beyond its authority. To do this

was jurisdiction. If it errs, its judgment is reversible by proper appellate procedure. But its judgment, until it be corrected, is a judgment, and cannot be regarded as a nullity.

In the leading case of *Ex parte Tobias Watkins*, 3 Pet. 193, 203, 206, the opinion was by Chief Justice Marshall. The question arose upon a writ of *habeas corpus*. The petitioner had been indicted and convicted. He sought to be discharged from prison because the indictment upon its face charged no offense cognizable by courts of the United States. The court said, among other things:

"An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The Circuit Court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court, is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it."

After referring to and commenting upon *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173, and *Skillern's Executor* v. *May's Executor*, 6 Cranch, 267, the court added:

"Had any offense against the laws of the United States been in fact committed, the Circuit Court for the District of Columbia could take cognizance of it. The question

whether any offense was or was not committed, that is, whether the indictment did or did not show that an offense had been committed, was a question which that court was competent to decide. If its judgment was erroneous, a point which this court does not determine, still it is a judgment, and, until reversed, cannot be disregarded."

This case was followed in *Ex parte Parks*, 93 U. S. 18, 23, and in *In re Coy*, 127 U. S. 731, 757, where this court, speaking by Mr. Justice Miller, said of the language just cited from *Ex parte Watkins*, that—

"It may be said that this language is too broad in asserting that, because every court must pass upon its own jurisdiction, such decision is itself the exercise of a jurisdiction which belongs to it, and cannot, therefore, be questioned in any other court. But we do not so understand the meaning of the court. It certainly was not intended to say that because a Federal court tries a prisoner for an ordinary common law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, he cannot be released by *habeas corpus* because the court which tried him had assumed jurisdiction.

"In all such cases, when the question of jurisdiction is raised, the point to be decided is, whether the court has jurisdiction of that class of offenses. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well-defined class of offenses, as forgery of its bonds or perjury in its courts, its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of *habeas corpus*."

The principle has been applied in many cases, notably in cases in which want of jurisdiction as a court of the

United States was apparent on the record. *Des Moines Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 557, 559; *Dowell* v. *Applegate*, 152 U. S. 327, 337.

In *McNitt* v. *Turner*, 16 Wall. 352, 365, the court, after passing upon various jurisdictional objections to a judicial sale of a title in controversy, said:

"But there is a comprehensive and more conclusive answer to all the objections to the sale which have been considered, and to others suggested which have not been adverted to.

"Upon the filing of the notice with the proof of publication, and the subsequent filing of the petition of the administrator for authority to sell, the Circuit Court had jurisdiction of the case. No presumption on that subject is necessary. Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error. The order of sale before us is within this rule. *Grignon's Lessee* v. *Astor et al.*, 2 How. 341, was, like this, a case of a sale by an administrator. In that case, this court said: 'The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; and so where an appeal is given, but not taken, in the time allowed by law.' This case and the case of *Voorhees* v. *The Bank of the United States*, 10 Pet. 449, are the leading authorities in this court upon the subject. Other and later cases have fol-

lowed and been controlled by them. *Stow* v. *Kimball* affirms the same doctrine."

The line between a judgment which is a plain usurpation of jurisdiction and one which is merely erroneous and reviewable only by seasonable appeal, is a plain one. The case in hand falls, in our judgment, within those which are merely reversible upon appellate proceedings, and the judgment decreeing the sale and appointing Waggaman as trustee to make the sale was not a nullity.

In *Voorhees* v. *Bank*, 10 Pet. 449, 474, this court said:

"The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper. There can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. It would be a well-merited reproach to our jurisprudence if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of a court, should not have the same protection under an erroneous proceeding as the party who derived the benefit accruing from it."

In *Fauntleroy* v. *Lum*, 210 U. S. 230, 237, it is laid down that a judgment cannot be collaterally impeached by showing that it was based upon a mistake of law.

But aside from the view we have expressed as to the validity of the proceedings when collaterally attacked, we are of opinion that the question of the validity of the decree of sale, the order appointing Waggaman trustee to make the sale, and the validity of the bond in suit is

not open to question by one who voluntarily became the surety upon the bond, thereby enabling his principal to obtain the proceeds of sale. Having obtained the trust and confidence of the court by aid of the security afforded by the solemn obligation to faithfully execute the order of the court and to pay into the court the proceeds of the sale which he undertook to make, neither the trustee so appointed, nor the surety for his performance of the trust, are in a situation to deny the regularity of the transaction. The proceeds which Waggaman received are either the funds of the beneficial owners of the property, or, if the sale be in fact void so far as to confer no title, the purchaser in equity and justice must be protected before the money is distributed. The benefit which Waggaman expected to secure, he has been enabled to enjoy through the voluntary execution of this bond by Clarke as his surety. That bond recites his due appointment, and it would be inequitable and unjust to permit either the principal or his surety to deny the fact.

This rule of estoppel has been applied in many cases. It was applied in respect to the bond of an Indian agent. The surety upon the bond denied liability because the Government did not produce the commission showing the appointment of his principal. The court said: "The bond upon which the suit was brought recites that he was appointed Indian agent and the obligors in the bond are therefore estopped from denying it." *Bruce* v. *United States*, 17 How. 437, 442.

The principle was applied to a distiller's bond where one of the defenses was that the bond was invalid. The court said:

"But we prefer to place our judgment upon the broader ground marked out by the adjudications of this court, to which we have referred. Every one is presumed to know the law. Ignorance standing alone can never be the basis of a legal right. If a bond is liable to the objec-

tion taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors." *United States* v. *Hodson*, 10 Wall. 395, 409.

It was applied in respect of a stay bond executed under a void act of legislation. "Not to apply the principle of estoppel to the bond in this case would," said the court, "it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice." *Daniels* v. *Tearney*, 102 U. S. 415, 422.

The opinions of the highest courts of the States are full of applications of the rule of estoppel. In *Plowman* v. *Henderson*, 59 Alabama, 559, the sureties upon the bond of an administrator were not permitted to show the illegality of his appointment. To the same effect is *White* v. *Weatherbee*, 126 Massachusetts, 450.

The sureties upon the bond of a sheriff were held estopped to deny validity of his appointment or the regularity of his bond. *Jones* v. *Gallatin County*, 78 Kentucky, 491.

In *People* v. *Norton*, 9 N. Y. 176, the sureties upon the bond of a trustee appointed by a chancery court were held estopped to deny the validity of the order appointing him.

In *State* v. *Anderson*, 16 Lea (Tenn.), 321, 335, and *United States* v. *Maurice*, 2 Brock, 96, the rule is recognized and applied.

The questions which we have considered arose upon

a plea which set out the proceedings in the case in which the bond had been taken, and averred their nullity for want of jurisdiction. Another and distinct defense relied upon in the plea was that after the proceeds of sale had come into the possession of said Waggaman that Mattie McC. Hine, one of the beneficiaries for whose use this suit is prosecuted by the United States, had agreed with the said Waggaman that he should retain in his possession and for his own purposes the fund aforesaid, and should pay to her interest at the rate of five per cent per annum, quarterly. That this agreement was acted upon and the interest so paid from the date of the receipt of the proceeds in 1899 to May 1, 1904, and that the agreement was without the knowledge or consent of the surety. There was a demurrer and joinder thereon to so much of the said plea as set out and relied upon the nullity of the proceedings under which the bond had been executed, and a replication and issue upon the plea relying upon any alleged agreement between Waggaman, the principal, and Mrs. Hine, as one of the beneficiaries in the bond. The demurrer was overruled and complainants electing to stand upon it, declined to further plead; whereupon the action was dismissed. From this judgment there was an appeal to the Court of Appeals of the District, where the judgment was affirmed.

So much of the plea as sought to defend the action in whole or in part in consequence of the alleged agreement between the principal in the bond and Mrs. Hine without the consent of the surety remains at issue undisposed of, and is accordingly not considered by us.

The judgment of the Court of Appeals so far as it determined the validity of the plea aforesaid was erroneous, and the case is reversed and remanded with direction to sustain the demurrer and remand the case for further proceedings not inconsistent with this opinion.

Reversed.